

(9)

Office - Supreme Court, U. S.
FILED
DEC 1 1944
CHARLES ELMORE OROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 718

COMMERCIAL NATIONAL BANK IN SHREVEPORT,
Petitioner,

versus

R. C. PARSONS, RECEIVER OF COMMERCIAL
NATIONAL BANK OF SHREVEPORT,

And

RANDLE T. MOORE, ET ALS., AS STOCKHOLDERS
COMMITTEE OF COMMERCIAL NATIONAL
BANK OF SHREVEPORT,

Respondents.

PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

And

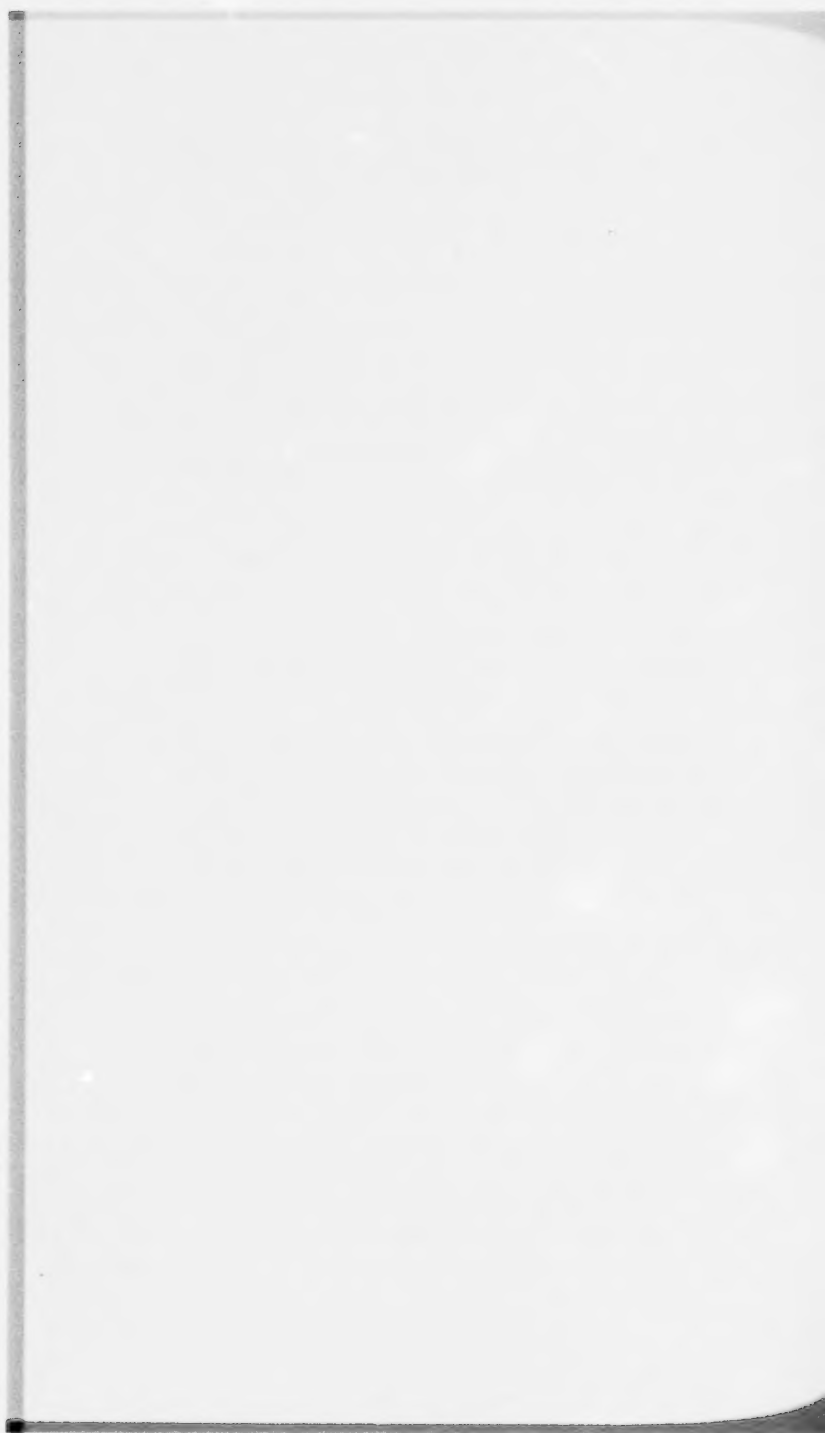
BRIEF IN SUPPORT OF PETITION FOR WRITS OF
CERTIORARI.

SIDNEY L. HEROLD,
SIDNEY M. COOK,
Attorneys for Petitioner.



INDEX

	Page
PETITION FOR WRIT OF CERTIORARI	i-ix
Opinions Below	ii
Summary Statement	iii
Jurisdiction	vi
Questions Presented	vi
Reasons Relied Upon For Allowance of Writ Of Certiorari	vii
 BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	 1-34
I. The Circuit Court of Appeals was without power to enlarge the right of the appellee in the absence of a cross-appeal.....	 3-10
II. Orderly judicial procedure is departed from by appellate court when it disregards solemn ad- mission made in the Lower Court, upon which that Court had acted: and when, on appeal, it is admitted by counsel that the decision below was correct	 10-14
III. The ruling that there was usury is inconsistent with local law	 15-24
IV. The ruling of the Circuit Court of Appeals with respect to the One Million Dollar note is inconsistent with decisions of other Circuit Courts of Appeal	 24-25
V. With respect to the so-called "tax savings"...	26-34
(a) The decision is inconsistent with local law	29
(b) The ruling below is inconsistent with de- cisions of this Court	 33



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

COMMERCIAL NATIONAL BANK IN SHREVEPORT,
Petitioner,

versus

R. C. PARSONS, RECEIVER OF COMMERCIAL
NATIONAL BANK OF SHREVEPORT,

And

RANDLE T. MOORE, ET ALS., AS STOCKHOLDERS
COMMITTEE OF COMMERCIAL NATIONAL
BANK OF SHREVEPORT,
Respondents.

**PETITION FOR WRITS OF CERTIORARI TO THE
UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT.**

*To the Honorable, the Chief Justice and Associate Justices
of the Supreme Court of the United States:*

The petitioner, COMMERCIAL NATIONAL
BANK IN SHREVEPORT, respectfully prays for the
issuance of writs of certiorari for the review of a decision

and decree made and entered in the United States Circuit Court of Appeals for the Fifth Circuit (Judges Holmes, McCord and Waller sitting).

An opinion was handed down by the court below on July 27, 1944 (R. 784) and is reported in 144 Fed. (2d) 231. Another opinion, on petition for rehearing, was entered on October 28, 1944 (R. 822) and is as yet not reported.

The original opinion

- (a) enlarged the rights of the appellees by reversing in their favor, in the absence of cross-appeal, the decree entered in the United States District Court for the Western District of Louisiana in respect of two of the causes of action there decided in favor of the petitioner, and hence adversely to the appellees; and
- (b) affirmed, on petitioner's appeal, that part of the decree of the District Court in which appellees had been successful.

(There was another issue raised by appellant's assignments of error, *i. e.*, that it was entitled to compensation for administration of assets, upon which the District Court was reversed. That matter is not here material, and is mentioned only for complete accuracy in statement).

Judge Waller dissented from the action of the Court in respect of all of the above conclusions, and filed a written opinion (R. 798).

Petition for rehearing was timely filed. In response thereto, another opinion was handed down (R. 822) adhering to that originally rendered: Judge Waller again dissenting.

Summary Statement of the Case.

This suit was instituted by the Receiver of a former national banking institution whose affairs had been taken over by another national bank, the present petitioner, under a written contract (R. 12, *et seq.*). The opinion complained of does correctly state:

"It involves a controversy between two national banks, but its correct decision upon all issues depends upon the law of Louisiana. For a statement of the case, including a verbatim quotation of the contract between the parties, see the opinions of the court below in *Leslie v. Commercial National Bank*, 28 Fed. Supp. 927, and *Rawlings v. Commercial National Bank in Shreveport*, 44 Fed. Supp. 5."

The complaint (R. 4, *et seq.*) declared upon certain definite causes of action, in respect of each of which it was asserted that the defendant (the present petitioner) had not properly accounted to the Receiver of the old bank. These asserted causes of action were based upon alleged unauthorized or illegal charges made by the new bank, principal among which were (R. 5) (a) that the new bank had made savings in taxes, in that it had caused realty pledged by the old bank to be assessed to the new bank, and its valuation thereby deducted from the assessment of its corporate structure under the provision of the Louisiana taxing statute providing for such deduction; (b) (R. 8) that

certain note for one million dollars given by the old bank as collateral was without consideration, and hence represented no indebtedness and justified no charge for interest; and (c) that a charge stipulated in a clause of the contract (R. 18) providing for the charging of interest at the rate of six percent per annum on Class B assets was (R. 9) unreasonable.

By amended complaint, the alternative claim was advanced (R. 45) that these interest charges were usurious.

The prayer (R. 11) was that, upon adjudication of those matters, an account "be made and filed in accordance with the rights of the plaintiff as herein set forth".

Representatives of the stockholders of the old bank intervened (R. 42), adopting the allegations and prayer of the Receiver's complaint.

Defendant (R. 30, *set seq.*), after putting these claims at issue, countered with cross-complaints based upon claims to compensation for administration of assets. The District Judge handed down two opinions (R. 50 and R. 684). These are reported as stated above. Final decree, pursuant to these opinions, was entered and signed on April 14, 1943 (R. 692). Reference to the final opinion (R. 684-695) discloses that the District Court considered that there were four questions before it, two of which—*i. e.*, the claim based upon the so-called tax savings, and defendant's claim for compensation—it decided against the present petitioner; and two—*i. e.*, the claim that the interest charge was unreasonable or usurious, and that

based upon the invalidity of the one million dollar note—in favor of petitioner.

The case reached the Circuit Court of Appeals upon an appeal taken by this petitioner on April 17, 1943 (R. 765). Petitioner there assigned as error three matters only, *i. e.*, the ruling of the District Court denying the claim for compensation; that holding it liable for the so-called tax saving; and, only incidental to the second, the decision of the District Court that it was liable for interest on such tax saving. Neither plaintiff nor intervenors cross-appealed; and, in their briefs, both admitted the correctness of the lower court's action (see dissenting opinion, R. 807-8).

Notwithstanding the absence of cross-appeal, and the admission in appellees' briefs of the correctness of the action of the lower court, two Judges of the three sitting undertook to reverse that decree in respect of issues on which petitioner had prevailed below.

Complaint of this action having been made by way of petition for rehearing, the two Judges filed another formal opinion in justification of their former ruling. (R. 822).

Contemporaneously with the filing of the petition for rehearing, petitioner filed with the Circuit Court of Appeals its motion for a reference of the case to the court *en banc*. This motion was denied in a formal order. (R. 821).

In addition to its action in assuming, in the absence of cross-appeal, to reverse that part of the decree of the District Court adverse to the appellees, and thereby to enlarge appellees' rights, the Circuit Court of Appeals affirmed that part of the decree of the District Court upon which the greater portion of the money judgment had been based. Upon petitioner's other assignment of error, *i. e.*, that relating to reimbursement for costs of administration, it reversed and remanded, but with the holding that the eventual right to recover was dependent upon a matter raised neither by pleading nor otherwise, *i. e.*, whether the defendant was responsible for the appointment by the Comptroller of the Currency of a Receiver for the old bank (R. 789).

Jurisdiction.

The original judgment of the Circuit Court of Appeals was entered July 27, 1944 (R. 784); the opinion refusing the rehearing, on October 28, 1944 (R. 822).

Jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925 (Title 28, U. S. C., Section 347).

Questions Presented.

1. At the threshold, there is presented the procedural question of universal legal importance, of the right and power of a United States Circuit Court of Appeals, in the absence of a cross-appeal, to enlarge the rights of an appellee: the absence of such power having been settled by innumerable decisions of this Court.

2. Subsidiarily thereto, the right of an intermediate appellate court to disregard express admissions made in the trial Court and on appeal by counsel for appellees of the correctness of the decree appealed from.

3. An important question of local law has been decided below in a way in conflict with applicable local decisions.

4. Another important question of substantive law has been decided below in conflict with applicable decisions of other Circuit Courts of Appeals.

5. An important question arising in the administration of affairs of embarrassed national banks has been here decided, wherein the majority of the Judges sitting below have decided an important question of substantive law in a way (if determinable by local law, as petitioner contends and as the original opinion states) in conflict with applicable local law; or, if a matter of federal law, then clearly in conflict with applicable decisions of this Court.

**Reasons Relied Upon for Allowance of
Writs of Certiorari.**

1. The action of the Court below in reversing, without cross-appeal and thereby enlarging the rights of the appellees, is such a departure from the accepted and usual course of judicial proceedings, and so plainly in conflict with a long line of decisions of this Court, as to call for the exercise of the power of supervision of this Court.

2. The action of the court below in disregarding and ignoring the express admission of appellees of the correctness of the decree of the court below, is likewise a departure from the accepted and usual course of judicial proceedings.

3. Upon a claim of usury advanced by appellees in their pleadings in the lower court, there adversely decided, and admitted in his brief and in argument to have been correctly adjudicated against him, the Circuit Court of Appeals, disagreeing with the lower court and with appellees, undertook to reverse and to hold that there was usury. This, despite the fact that the amount claimed to be usurious did not proceed from a loan of money; and that, under the applicable decisions of the courts of Louisiana, wherein the contract was made and to be performed, usury can arise out of nothing except a loan of money.

4. The Circuit Court of Appeals, again enlarging the rights of appellees without a cross-appeal, held (R. 794), despite the admissions, that a note for One Million Dollars, executed as evidence of the stockholders' liability of the old bank, was without consideration. The ruling of the Court below was in conflict with decisions of the Circuit Court of Appeals of the First Circuit, and of the Fourth Circuit.

5. The only question presented to the court below by the appeal (outside, of course, of the contention raised by petitioner below of its right to compensation for administration, and which is not here material), was the liability held by the lower court to exist (R. 50, *et seq.*),

through the saving by petitioner of taxes growing out of the assessment to it of realty belonging to the old bank, represented by the Receiver. Decision of that issue involved an interpretation of the local law of pledge or antichresis, wherein the decision of the majority below was in conflict with such local law.

Beyond the inconsistency of such decision with local law, it was, in its holding that there was a saving by the new bank and not by its stockholders, in plain conflict with decisions of this Court.

WHEREFORE, your petitioner prays that writs of certiorari be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be named therein, a full and complete transcript of the record of the proceedings in case Number 10,669, entitled on its docket "Commercial National Bank in Shreveport v. R. C. Parsons, Receiver of Commercial National Bank of Shreveport"; and that said judgment of the said Circuit Court of Appeals in said case may be reversed by this Honorable Court, and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet.

SIDNEY L. HEROLD,
SIDNEY M. COOK,
Shreveport, Louisiana,
Attorneys for Petitioner.



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

COMMERCIAL NATIONAL BANK IN SHREVEPORT,
Petitioner,

versus

R. C. PARSONS, RECEIVER OF COMMERCIAL
NATIONAL BANK OF SHREVEPORT,

And

RANDLE T. MOORE, ET ALS., AS STOCKHOLDERS
COMMITTEE OF COMMERCIAL NATIONAL
BANK OF SHREVEPORT,

Respondents.

**BRIEF IN SUPPORT OF PETITION FOR
WRITS OF CERTIORARI.**

SIDNEY L. HEROLD,
SIDNEY M. COOK,
Attorneys for Petitioner.



TABLE OF AUTHORITIES CITED IN BRIEF

	Page
<i>Federal Decisions:</i>	
Aberly v. Craven County, 70 Fed. (2d) 52.....	25
Bolles v. Outing Co. 175 U. S. 262, 268.....	5
Chittenden v. Brewster, 2 Wall. 191, 196.....	5
Clark v. Killian, 103 U. S. 766, 769.....	5
Des Moines National Bank v. Fairweather, 263 U. S. 103, 106	28, 33
Federal Trade Commission v. Pacific States Paper Trade Asso., 273 U. S. 52, 66.....	5
First National Bank v. Anderson, 269 U. S. 341, 347..	28
First National Bank v. Kentucky, 9 Wallace, 353.....	28
First National Bank of Shreveport v. Louisiana Tax Commission, 289 U. S. 60	28
Garfield v. United States, 211 U. S. 249, 262.....	14
Helvering v. Pfeiffer, 302 U. S. 247, 251.....	6
Hubbard v. Tod, 171 U. S. 474, 494.....	5
Landram v. Jordan, 203 U. S. 56, 62.....	5
Langnes v. Green, 282 U. S. 531, 538.....	5
Loudon v. Taxing Dist., 104 U. S. 771, 774.....	5
Maria Martin, The, 12 Wall. 31, 40, 41.....	5
Mt. Pleasant v. Beckwith, 100 U. S. 514, 527.....	5
New Orleans Mail Co. v. Flanders, 12 Wall. 130, 134, 135	5
Peoria & P. U. R. Co. v. United States, 263 U. S. 528, 536	5
South Fork Canal Co. v. Gordon, 6 Wall. 561, 568....	5
Southern Pacific R. Co. v. United States, 168 U. S. 1, 65	5
Trustees of Somerset Academy v. Picher, 90 Fed. (2d) 741, 744	25
United States v. American Rwy. Exp. Co., 265 U. S. 425, 435	5
United States v. Blackfeather, 155 U. S. 180, 186....	5
United States v. Hickey, 17 Wall. 9, 13.....	5
Warner Co., Charles v. Independent Pier Co., 278 U. S. 85, 91	5
William Bagaley, The, 5 Wall. 377	5

TABLE OF AUTHORITIES
CITED IN BRIEF
(Continued)

	Page
<i>Louisiana Decisions:</i>	
Allen & Currie v. Shreveport, 113 La. 1091.....	16
Bank of Louisiana v. Briscoe, 3 La. Ann. 157, 159....	21
Clement v. Dunn, 168 La. 394, 403.....	20
Elder v. Ellerbe, 135 La. 990, 994, 995	30
Isaacs v. Van Hoose, 171 La. 676	15
Mutual National Bank v. Regan, 40 La. Ann. 17, 19..	22, 24
Phelan v. Wilson, 114 La. 814	27
Peoples Bank v. Shreveport Ice & Brewing Co., 142 La. 798, 808	16
Vinet v. Bres, 48 La. Ann. 1254	16
<i>Louisiana Codal Articles:</i>	
Louisiana Civil Code, Article 1890.....	15
Louisiana Civil Code, Article 1950.....	19
Louisiana Civil Code, Article 1956.....	19
Louisiana Civil Code, Article 2924.....	22
Louisiana Civil Code, Article 3168.....	29
Louisiana Civil Code, Article 3178.....	30
Louisiana Code of Practice, Article 35.....	16
<i>Louisiana Statutes:</i>	
Act 221 of 1928 of Louisiana Legislature (Appendix) .	38
Act 6 of 1934 (Appendix)	40
Act 14 of 1917 (Appendix)	35
<i>Federal Statutes:</i>	
U. S. Code, Title 12, §548	33
<i>Miscellaneous:</i>	
American Jurisprudence, Volume 3, page 35.....	13
Corpus Juris, Volume 12, page 986.....	10
Williston, "Contracts", Vol. 2, §381, page 1106.....	16

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No.

COMMERCIAL NATIONAL BANK IN SHREVEPORT,
Petitioner,

versus

R. C. PARSONS, RECEIVER OF COMMERCIAL
NATIONAL BANK OF SHREVEPORT,

And

RANDLE T. MOORE, ET ALS., AS STOCKHOLDERS
COMMITTEE OF COMMERCIAL NATIONAL
BANK OF SHREVEPORT,

Respondents.

**BRIEF IN SUPPORT OF PETITION FOR
WRITS OF CERTIORARI.**

There could hardly be a clearer case of "departure from the accepted and usual course of judicial proceedings" than the rendition of judgment without hearing or opportunity to be heard. Yet, that is exactly what occurred here with reference to definite and concrete issues on which the Court of Appeals undertook to reverse de-

cisions of the trial court favorable to petitioner and from which respondents had not cross-appealed. Reference to the dissenting opinion (R. 807-8) discloses express admissions that issues decided in the District Court in favor of defendant (the present petitioner) were there made after abandonment of those issues by counsel for plaintiff and intervenors.

The suit, as brought, asked relief against the present petitioner on certain definite complaints. Some of them, after admission of want of merit, were decided against the plaintiff and intervenors; others formed the subject of a decree against defendant (this petitioner). Petitioner alone appealed. There was no cross-appeal. On the contrary, the printed briefs and oral arguments of plaintiff and of intervenors—the only appellees—conceded the correctness of that part of the judgment of the District Court which had gone against them. Moreover, they conceded that the same concession had been made in the trial court. Moreover, they prayed for an affirmance of that judgment. Under those circumstances, this petitioner, as appellant, did not discuss those issues either in brief or orally. As a matter of fact, it could not have done so, because they were not before the Court.

Yet, despite this situation, the Circuit Court of Appeals assumed to enlarge the rights of appellee by reversing and remanding generally, with directions to the District Court to render a new decree not inconsistent with its opinion: an opinion which puts the District Judge in error in respect of his ruling on concrete issues conceded below and on appeal, and never appealed from.

I.

**THE CIRCUIT COURT OF APPEALS WAS
WITHOUT POWER TO ENLARGE THE
RIGHT OF THE APPELLEE IN THE ABSENCE
OF A CROSS-APPEAL.**

As pointed out in the petition, the decree of the District Court went against plaintiff and intervenors in respect of the two asserted causes of action

- (a) that the petitioner had collected interest unreasonable or usurious (R. 46); and
- (b) (R. 8-9) that the one million dollar note of the old bank was without consideration, and represented no indebtedness.

The District Court decree was in favor of plaintiff and against the petitioner on the other two causes of action

- (a) the claim of liability for savings on taxes, growing out of the assessment to petitioner of pledged realty, as "a fruit of the pledge"; and
- (b) in the denial of petitioner's claim, as cross-complainant, for services in the administration of assets.

Petitioner alone took an appeal. No cross-appeal was attempted by plaintiff or by intervenors.

What the Circuit Court of Appeals assumed to do is correctly summarized in the last paragraph (R. 830) of the opinion refusing a rehearing:

"To recapitulate briefly: We held that savings on taxes obtained by the pledgee through use of pledged

reality were a fruit of the pledge and belonged to the pledgor; that interest on assets charged against the old bank was usurious and should be disallowed; that appellant is entitled to a reasonable fee for its services in administering Class C assets if it earned the same by faithful and efficient services; that the cost of administering Class B assets must fall entirely upon the new bank; that the consideration for the one million dollar note failed because the pledged assets of the old bank exceeded its liabilities and there was no deficiency-liability of stockholders; that after hearing such additional evidence as may be offered, the district court should make further findings as to what if any compensation should be allowed the new bank for its services and expenses in administering Class C assets; and that the judgment should be reversed and the cause remanded generally for further proceedings not inconsistent with the opinion."

Thus, in remanding "generally for further proceedings not inconsistent with the opinion", the Court remanded with an opinion holding squarely: (a) that the interest charge was usurious, despite the decision of the lower court to the contrary, and (b) that there was no consideration for the one million dollar note, in the face of a decision favorable to the petitioner in the District Court on that score.

That "the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below" (see *United States v. American Railway Express Co.*, 265 U. S. 425, 435), is a proposition so elementary in federal appellate

practice that, without quoting therefrom, we deem it proper to refer by citation only to some of the authorities:

- United States v. Hickey*, 17 Wall. 9, 13;
United States v. Blackfeather, 155 U. S. 180, 186;
Chittenden v. Brewster, 2 Wall. 191, 196;
The William Bagaley, 5 Wall. 377;
South Fork Canal Co. v. Gordon, 6 Wall. 561, 568;
The Maria Martin, 12 Wall. 31, 40, 41;
New Orleans Mail Co. v. Flanders, 12 Wall. 130, 134, 135;
Mt. Pleasant v. Beckwith, 100 U. S. 514, 527;
Clark v. Killian, 103 U. S. 766, 769;
Loudon v. Taxing Dist., 104 U. S. 771, 774;
Hubbard v. Tod, 171 U. S. 474, 494;
Bolles v. Outing Co., 175 U. S. 262, 268;
Landram v. Jordan, 203 U. S. 56, 62;
Peoria & P. U. R. Co. v. United States, 263 U. S. 528, 536;
United States v. American R. Exp. Co., 265 U. S. 425, 435;
Federal Trade Commission v. Pacific States Paper Trade Asso., 273 U. S. 52, 66;
Charles Warner Co. v. Independent Pier Co., 278 U. S. 85, 91;
Langnes v. Green, 282 U. S. 531, 538;
So. Pac. R. Co. v. United States, 168 U. S. 1, 65.

Such cases as *United States v. American Express Co.*, 265 U. S. 425, in no way weaken that rule. In fact, that decision so states. All that case held is (like *Langnes v. Green*), that wrong reasons given by a trial court for a correct decision do not justify reversal. In other words,

that appellee may urge any sound reasons in support of a decree in his favor, but is wholly precluded from attacking it. This is unbroken jurisprudence.

Helvering v. Pfeiffer, 302 U. S. 247, 251:

"While a decision below may be sustained, without a cross-appeal, although it was rested upon a wrong ground, an appellee cannot, without a cross-appeal, attack a judgment entered below."

The statement in the opinion (R. 795) that an appeal in equity removes the entire case to an appellate court for a trial *de novo*⁽¹⁾ on the record and evidence, leaves out the equally as important ruling that the appellate court may review *de novo* only so much of the decision as has come within its jurisdiction by an appeal.

The assumption in the majority opinion (R. 795-6) that this rule does not apply to an equity appeal is wholly without justification. This Court has never recognized such doctrine, but on the contrary the great majority of the cases heretofore cited were equity appeals. The point is, not that the appeal is in equity, at law, in bankruptcy, or in admiralty, but that *the appellate jurisdiction of the court must be invoked by an appeal before the court has any authority to act upon the complaint*. One who considers himself aggrieved by the judgment of a trial court

(1) All the authorities, (even those cited by the Court R. 796), make plain of course that the trial *de novo*, incident to an equity appeal, means only that the case is thrown wide open on the law and the facts, insofar as the appellate jurisdiction of the reviewing court has been invoked. It has never meant that appellee may have his rights enlarged without a cross-appeal.

has no recourse, no matter what the nature of the suit may be, unless he appeal. Complaints in his brief are disregarded. Cross assignments are not permitted. The appellate court is utterly lacking in power to correct, when the aggrieved party has failed to set in motion that legal process which alone can give that court authority to correct.

The majority opinion assumes the existence of a different rule in a suit for an accounting. It is respectfully submitted that no authority may be found for such differentiation. But this suit is not merely one for an accounting. Let us look again at the record.

The complaint, it is true, does ask for a final accounting, but an accounting based upon specific and detailed complaints. It does not stop merely with setting up a fiduciary relation, the duty of accounting, and a prayer for an accounting. The Receiver was not kept in ignorance of defendant's accounting. Such accounting had been regularly had. With meticulous detail, he therefore complains only that the defendant is liable with respect to certain specific items. Though it involve repetition, we again set out the particular complaints asserted in the pleading of appellees:

Paragraph 10 avers the improper charging of taxes; paragraphs 11 and 12, the liability of the defendant because of the so-called "tax saving"; paragraph 14, the duty of the defendant to account "for all profits, fruits, rents, income or other advantages received by it through the use of the property transferred to it"; paragraphs 15 and 16, the contention with respect to the one million dollar note;

paragraph 17, liability for interest on the one million dollar note; paragraph 18 attacks the right of the defendant to the "6% on Class B Assets charge"; paragraph 19 claims that certain items of interest should be disallowed.

The prayer (R. 11) is for an accounting to "be made and filed *in accordance with the rights of the plaintiff as herein set forth*", and that as a result thereof, there be a decree that the old bank is no longer indebted to the new bank and directing a retransfer of all of the assets purported to be transferred in the agreement of December 3, 1932. The further prayer is for judgment "for such sums as may be found to be due to plaintiff bank upon the settlement of the account *in accordance with the allegations hereof*". Thus, it will be seen that the plaintiff came into court, not with a blanket suit for accounting, but upon a complaint based upon certain specific allegations which were made the issues upon which joinder was had and trial conducted.

As a result of that trial, the District Court rejected certain of plaintiff's contentions, and found in his favor upon others. The items upon which the District Court found against the defendant were those set up in the assignments of error upon which the case was briefed and argued in the appellate court.

When the defendant prosecuted its appeal, it of course made no complaint against the judgment which had been rendered in its favor. It could not appeal from the judgment it had itself successfully demanded. The appeal, as shown by the assignments of error (see R. 799), meant

only that the jurisdiction of the appellate court had been invoked, insofar as the judgment below had run against appellant. But in order properly to present such appeal to that Court, necessarily there had to be designated the entire record: this because it would have been impossible for the Court intelligently to examine into the facts upon which the decree proceeded and upon which the appellant based its claim of error, without there being before it the entire record, including the pleadings and evidence.

Plaintiff took no appeal; intervenors took no appeal, although the judgment ran against them also in respect of the matters whereon the appellate court, by reversing, enlarged their rights. The three months within which (*U. S. C., Title 28, § 230*) their cross-appeal might have been taken ran, and no effort was ever made by complainant or intervenors to invoke the appellate jurisdiction of the Court. The judgment of the District Court insofar as it had rejected the specific claims of complainant and intervenors, had therefore become final and was the property of the Commercial National Bank in Shreveport, the only appellant in the Court.

For, of course, insofar as the judgment below had denied recovery to complainant upon its several causes of action pleaded, defendant was judicially exonerated from liability. A judgment denying recovery is as much the property of a defendant as is a judgment in favor of a plaintiff the property of the plaintiff. One may be deprived of his property only by legal action under valid law.

The law here limited attack upon the judgment by complainant and intervenors to a period of three months.

"The bar arising from the lapse of time within which an appeal may be taken is a vested right."

Corpus Juris, Volume 12, page 986, and authorities cited.

If the right of the defendant to protection under its favorable decree was to have been affected, this could have been done only by cross-appeal. Complainant and intervenors had full opportunity so to do. They deliberately refused to invoke that jurisdiction of the Court of Appeals, however; because, as they had solemnly told the lower court and as they afterwards repeatedly told the appellate court, they agreed with the defendant that the District Court's ruling thereon was correct.

II.

ORDERLY JUDICIAL PROCEDURE IS DEPARTED FROM BY AN APPELLATE COURT WHEN IT DISREGARDS SOLEMN ADMISSIONS MADE IN THE LOWER COURT, UPON WHICH THAT COURT HAD ACTED: AND WHEN, ON APPEAL, IT IS ADMITTED BY COUNSEL THAT THE DECISION BELOW WAS CORRECT.

As pointed out in the dissenting opinion (R. 807), the brief for the Receiver (appellee) in the Circuit Court of Appeals, expressly stated:

"At the trial of the case counsel for plaintiff stated to the court that, while still of the opinion that the charges for so-called interest were grossly exces-

sive, they could find no adequate legal basis for relief from the express provisions of the contract with respect thereto. * * * No cross appeal has been filed."

Thus, as made clear in the dissenting opinion (R. 808) :

"The majority puts the lower Court in error for not doing that which counsel stated frankly they advised the lower Court there was no legal basis for doing."

Moreover, appellee's brief (R. 808) expressly admitted that the "six percent interest" charge, which the majority opinion holds usurious, was not interest at all.

"While this charge was denominated in the contract as an interest charge, in effect it was a liquidation charge."

Thus, Judge Waller's comment (R. 809) is wholly apropos :

"Of course the old bank did not cross appeal because of the allowance by the lower Court of that which counsel for the old bank admitted was proper under the contract when they, referring to the 6% service charge, stated to the lower Court at the beginning that 'they could find no legal basis for relief from the express provisions of the contract in respect thereto'. It is a universal rule that the lower Court will not be put in error when the errors complained of were not seasonably called to the lower Court's attention; but here the majority is putting the lower Court in error, not for alleged errors that were called to the Court's attention but for something over which all parties below were in accord, and which had the express approval of the appellee. Counsel for the appellees, being lawyers of outstanding ability and integrity, have not here urged that which the majority seeks to force them to ac-

cept, but they have with great circumspection realized that they took no cross appeal, and that, in fact, a cross appeal from a ruling made with their consent and advice would ordinarily meet only rebuke."

The "departure from the accepted and usual course of judicial proceedings", petitioner avers is—outside of its enlargement of the rights of appellee without cross appeal—two-fold:

- (a) in its holding of the trial court in error because of ruling expressly approved below by the appellee prior to the entry of judgment; and
- (b) in disregarding the express admission of appellee of the correctness of the lower court's ruling.

For it is apparent that through both processes, the appellant below (the petitioner here) was entirely cut off from argument or discussion of the matters upon which the Court of Appeals reversed, when petitioner was met in that court by express and formal admission of the correctness of what the lower court had done.

(a)

So many cases in this court, and in all the other courts throughout the country, affirm the rule of orderly procedure that a litigant may not on appeal controvert the theory upon which he tried the case below, that they may not be cited in this brief without violation of the rule of this court requiring, on certiorari, that the brief be direct

and concise. The cases are cited in *American Jurisprudence*, Volume 3, page 35, under the text, § 253:

"It is well settled that the theory upon which the case was tried in the court below must be strictly adhered to on appeal or review."

See also § 873 and cases cited.

A fortiori, seemly judicial procedure, and proper professional conduct would seem to forbid counsel on appeal departing from, and controverting express admissions upon which the trial court had acted in rendition of judgment. Counsel for appellees here, gentlemen of the bar of the highest professional standing, cognizant of their professional obligation, did not attempt to put the trial Judge in error in respect of matters upon which he had been led—at least in part—by their statements on trial. In fact, in the Circuit Court of Appeals they repeated these admissions and asserted their correctness.

In the face of these admissions, we submit, without further argument, that the appellant (the present petitioner) was done injury, irremediable except for the exercise of the supervisory power of this Court, by deprivation of opportunity to present argument on what was, not only by the absence of cross-appeal but by admission of opposing counsel, no longer a matter of controversy.

(b)

It seems to have been ignored by the majority of the court below that counsel appearing at its bar are officers of the court. They represent their clients, it is true, but their professional duty and obligation is primarily to the court.

So, when counsel for the appellees came into the Circuit Court of Appeals, and there stated plainly and unequivocally, in brief and in oral argument, that the decision of the District Court, insofar as it had run against them, was correct, there no longer could have been an issue on that score.

That admission, of course, in addition to all else that had transpired, operated as an insuperable barrier to the appellant (the present petitioner) presenting argument on these questions. For they were no longer questions; they were matters decided, not the subject of any form of controversy. Indeed, petitioner's counsel would have been justly censured by the court below had they undertaken to consume the time of the court with argument or brief upon matters admitted by opponent not to be controversial, but to have been correctly decided in the District Court, and there on their express admission.

It jumps to the eye that petitioner was, therefore, condemned in the Circuit Court of Appeals without hearing or opportunity for hearing: plainly a denial of due process.

"The right to be heard before property is taken or rights or privileges withdrawn which have been previously legally awarded is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this court."

Garfield v. United States, 211 U. S. 249,
262.

III.

**AS TO THE RULING THAT THERE
WAS USURY.**

If the court below were justified in decreeing an enlargement of the rights of the appellee in the absence of a cross appeal and of reversing in his favor upon matters which had been decided against him in the trial court on his concession and then admitted in the Court of Appeals to have been correctly there decided, the decision of the Circuit Court of Appeals here holding that there was usury is inconsistent with applicable decisions of the Louisiana courts. Reference to the contract (R. 15) discloses that the new bank (this petitioner) had assumed, as a debtor, all of the obligations of the old bank (here represented by its Receiver). The majority opinion admits that the liabilities were assumed, but erroneously concludes (R. 790) that the new bank became merely a guarantor of those obligations; when, as a matter of local law, it became the principal debtor.

Isaacs v. Van Hoose, 171 La. 676.

The obligation assumed by the new bank was, under the local law, a *stipulation pour autrui*; i. e. an obligation validly assumed toward a third party. The *Civil Code* of the State provides, Article 1890:

"A person may also, in his own name, make some advantage for a third person the condition or consideration of a commutative contract, or onerous donation; and if such third person consents to avail himself of the advantage stipulated in his favor, the contract can not be revoked."

Article 35 of the Louisiana Code of Practice expressly provides for a direct action for the enforcement of the obligation in behalf of the party in whose favor it has been contracted. The acceptance of the stipulation may be evidenced by conduct, as well as by express formal acceptance.

Vinet v. Bres, 48 La. Ann. 1254, and cases there cited;

Allen & Currie v. Shreveport, 113 La. 1091 (1101);

Peoples Bank v. Shreveport Ice & Brewing Co., 142 La. 798, 808, and cases there cited.

It is of interest to note here that Mr. Williston (Contracts, Vol. 2, paragraph 381, page 1106) refers to Louisiana as one of the states in which the right of the third person to sue upon the *assumpsit* is direct and unequivocal.

No justification, therefore, exists for the ruling that the obligation of the new bank was merely that of a guarantor, and that it was therefore to advance money for the account of the old bank.

For all practical purposes, all of the debts assumed were deposits. We say this because the statement of December 2nd (R. 343) shows that there was more cash on hand than obligations, outside of deposits. The depositors continued to do business with the Commercial National Bank, but with the "in" bank instead of the "of" bank. They deposited money in the "in" bank, and they drew checks on the "in" bank. They recognized, therefore, the *assumpsit* by the new bank, and their continuous conduct in treating their deposits as being in the "in" bank instead of in the old "of" bank, was that complete acceptance of the *stipulation pour autrui* which, under the law of Lou-

isiana, made the obligation irrevocable in favor of each such creditor; i. e., the depositors.

Because, as above pointed out, the new bank had assumed, as a debtor, all of the obligations of the old bank, it is a patent fact that it was never called upon to advance to the old bank one cent. It made the liabilities of the old bank its liabilities, and those liabilities were the deposits. When the new bank assumed these liabilities, it advanced no money. It had the depositors' money. When the depositors withdrew their money, they withdrew it from the new bank. They drew it out of cash on hand, and cash on hand represented paid-in capital, plus so much of deposits as was not invested or loaned. The new bank was a going concern, just as the old bank would have been, had its affairs not been involved through mismanagement to the extent that it could not longer function as a bank. After the contract, the old bank went out of business, irretrievably and with no hope of ever again engaging in business. As a banking institution, it was dead. No depositor thereafter dealt with it, directly or indirectly. All accounts were transferred to the new bank.

Thus the new bank neither advanced nor loaned any money to the old bank; and usury, under the law of Louisiana, can never exist except as growing out of excessive interest charged upon a *loan of money*. (See authorities later cited). The provision in the contract which the Court erroneously held to provide for a usurious charge for money loaned, appears in paragraph 5 (R. 18), which reads as follows:

"All cash from time to time collected or realized from the corpus or principal of 'Class C' assets and

all interest and other revenue derived from 'Class B' and 'Class C' assets shall be credited to an account to be called 'Class C Assets Account', and to this account shall be charged reasonable salaries of officers and employees in collecting and administering 'Class B' and 'Class C' assets together with legal fees and other expenses properly chargeable to 'Class B' and 'Class C' assets, *and to this account shall be charged interest computed on daily balances at the rate of six percent (6%) per annum on the account or accounts carried on the general ledger and called 'Class B Assets'.*" (Italics ours).

The majority opinion assumes that the interest "was intended as compensation for the use of money to be advanced" (R. 790).

But, as we have pointed out, the contract never called upon the new bank to advance any money to the old bank and, indeed, it never made such loans. Its assumption of the old bank's liabilities carried with it definite and difficult obligations, *but none of those was to loan money* to the old bank.

When these facts are considered, and the contract correctly analyzed, the whole basis falls out of the argument that there was usury. For, if there was no loan of money to the old bank, no interest was of course charged on any loan. If no interest was ever charged upon a loan to the old bank, there could have been no usury practiced by the new bank toward the old bank.

The contract, however, does provide for a charge, "computed on daily balances at the rate of six percent per annum on the account or accounts carried on the general

ledger and called 'Class B Assets' ". That charge is styled "interest", but this provision counsel for the Receiver and for the intervenors properly conceded in the trial court and in the appellate court, in their briefs and in oral argument, to be a charge for services and not interest (R. 808). This concession undoubtedly grew out of counsel's knowledge of the law of Louisiana, whose Civil Code distinctly provides that the use of inept or incorrect words in a contract does not affect its validity, or the duty of the court to determine the real and common intent of the contracting parties.

So, here, since interest, as interest, may be charged only for the actual loan of money, the word "interest" in the clause in question was a rather inept designation of the compensation agreed upon. But that fact does not affect the right to the collection of the charge so stipulated.

It was provided, in plain and unequivocal language, that the old bank should be charged with 6% per annum, computed on daily balances "on the account or accounts carried on the general ledger and called 'Class B Assets' ". The Civil Code of Louisiana provides:

Article 1950: "When there is anything doubtful in agreements, we must endeavor to ascertain what was the common intention of the parties, rather than to adhere to the literal sense of the terms."

Article 1956: "When the intent of the parties is doubtful, the construction put upon it, by the manner in which it has been executed by both, or by one with the express or implied assent of the other, furnishes a rule for its interpretation."

That it is the common intent, and not the literal application of words improperly used, that is sought by the courts of Louisiana see *Clement v. Dunn*, 168 La. 394, 403, and cases cited.

Moreover, the appellee has always construed the contract as did the District Court.

In invoking judicial relief, the Receiver came into court, alleging in paragraph 18 of his complaint (R. 9):

"The charges thus made while termed 'interest', are in fact a service charge for administration and liquidation of certain assets of the old bank since said charge is based not upon any amounts paid out by the defendant bank or borrowed from it, but upon the stated book value of certain assets delivered to the defendant bank for liquidation."

And, though the majority opinion (R. 791) states that the record discloses a plea of usury, it will be noted that such plea (R. 45) was made entirely in the alternative; and that any contention upon this score was formally abandoned in the trial court and could not, therefore, be said still to have been an issue in the appellate court. This was the express admission of counsel for the appellee. On page 5 of their brief (R. 807) they say:

"At the trial of the case, counsel for plaintiff stated to the court that, while still of the opinion that the charges for so-called interest were grossly excessive, they could find no adequate legal basis for relief from the express provisions of the contract with respect thereof".

Thus, not only was the judicial process invoked upon the plaintiff's interpretation of the contract that the six percent charge was not interest upon borrowed money, but the decree of the District Court rejecting such contention was made upon plaintiff's express admission.

The court below was, therefore, wholly in error in saying (R. 797) that the plea of usury "is in the record before us on this appeal"; and then holding that there was usury upon an interpretation wholly inconsistent with that placed upon the contract by the plaintiff himself.

Moreover, as a matter of local law, there never can be usury except in connection with excessive interest upon an actual loan of money. In *Bank of Louisiana v. Briscoe*, 3 La. Ann. 157, 159, the Court said:

"The operation of this article of the Code has always been limited to loans of money. No evasion of it has ever been tolerated, but it has always been confined to its true intent, and been held not to apply to the purchase and sale of promissory notes, bills of exchange and other negotiable instruments, nor to the transfer and sale of credits."

In that case, the Court points out, page 161:

"We do not think that the form in which the contract under consideration appears affects at all the merits of the cause * * *. The form of the contract is, therefore, immaterial; its true character, resulting from its cause and obligations, is alone important in directing our inquiries and determining its validity."

This case has been often cited, and is the settled law of Louisiana. It is the settled law of Louisiana be-

cause it is the provision of the Civil Code itself. The opinion below seeks to draw its authority from Article 2924 of the Civil Code of Louisiana, which in express terms fixes the rate of interest only in respect of loans of money.

But, in answer to a contention that usury might be spelled out of other than excessive interest stipulated to be paid upon a loan of money, the court in *Mutual National Bank v. Regan*, 40 La. Ann. 17, 19, said:

"We do not see how this relief could be granted unless we should strike out Article 2924 of the Civil Code."

When, therefore, consideration is given to the surrounding facts and circumstances and to the local law, it must be apparent that the Court erred when it said (R. 793):

"Appellant did not stipulate for and is not entitled to any fee, premium, or commission for assuming the obligations of the old bank. This was the consideration moving from appellant to the old bank for the good will of its business and the pledge of every asset it possessed. This was the only consideration that the old bank and its stockholders received under the contract."

Appellant did stipulate for, and consequently is entitled to compensation for assuming the obligations of the old bank. This, because such compensation was expressly agreed upon, and part of such compensation was the 6% charge on accounts represented by Class B assets. The good will of the business of the old bank was *not* a consideration moving from appellant to the old bank, *because*

the old bank possessed no good will. It was not even in condition to reopen its doors. It would have been a complete loss had the new corporation not assumed its liabilities. Had the old bank attempted to continue business in the face of the report of the National Bank Examiner, and the inevitable "run" had ensued, not only would it have collapsed but the economic structure of the entire territory would have been disastrously affected, with grave injury to the personal fortune of each one of its stockholders.

And, finally, it is to be borne in mind that the new bank was not called upon to advance one cent in *money* to the old bank. The unambiguous language of the contract shows what the agreement was; namely, *to assume the obligations of the old bank.* As long as the creditors of the old bank were satisfied with that assumption, looking to the new bank as the source of eventual payment, no loan of money was ever to be made. Now, who were those creditors? We repeat: they were the depositors. The position of those depositors was simply shifted by the contract, so that their deposits remained in the new bank as the successor to the old one. They were free to withdraw their deposits from the new bank whenever they saw fit. Many did see fit to withdraw: as pointed out in the dissenting opinion (R. 807) \$4,000,000.00 was so withdrawn during the first few weeks after the change. But the drawing out of that money was simply the withdrawal of deposits; and, of course, was paid out of deposits. It merely represented a shrinkage in deposits. As long as a

sufficient balance was left on hand to pay withdrawing depositors, the new bank could not have been called upon to advance any of its money for any purpose.

Consequently, counsel for the Receiver correctly interpreted the agreement when they made their judicial allegation (R. 9) that this charge

“is based not upon any amounts paid out of the defendant bank, or borrowed from it.”

Under such circumstances, it is impossible to spell out usury

“unless we should strike out Article 2924 of the Civil Code”.

Mutual National Bank v. Regan, supra.

IV.

THE RULING OF THE CIRCUIT COURT OF APPEALS WITH RESPECT TO THE ONE MILLION DOLLAR NOTE IS INCONSISTENT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEAL.

Reference to the contract (R. 14) discloses that among the assets taken over by the new bank was a promissory note of the old bank in the sum of One Million Dollars, bearing six percent per annum interest. That note (R. 15) was declared to be an absolute obligation of the old bank. Its amount represents the double statutory liability of stockholders in national banks. This note was originally classed among the “Class B Assets” (R. 17) *i. e.*, those assets which the new bank took to indemnify itself against its assumption of all of the liabilities of the old bank. Later, as was held by the District Judge (R.

692), this note was transferred from "Class B Assets" to "Class A Assets," *i. e.*, those which were taken over by the new bank absolutely, and for which a present irrevocable credit was given by the new to the old bank. Thus, as pointed out by the District Judge, the transfer of this note from "Class B Assets" to "Class A Assets" reduced the amount of the assumed liabilities by an amount exactly equal to the face of the note. (See stipulation, R. 348-351).

The majority opinion below, however, holding that the note was utterly without consideration, decided that all of the interest collected on the note was usurious (R. 794), thus putting the District Judge, the counsel for the Receiver, the counsel for the intervenors, and the Comptroller of the Currency, all in error⁽¹⁾.

But in this respect, the decision below is squarely in conflict with applicable decisions of other Circuit Courts of Appeal: notably, with that of the First Circuit in *Trustees of Somerset Academy v. Picher*, 90 Fed. (2d) 741, 744, where the Court stated that the giving of such notes is

"a practice frequently adopted in the taking over by one bank of another",

and that of the Fourth Circuit in *Aberly v. Craven County*, 70 Fed. (2d) 52, where it was said by Judge Parker

"The power of the directors to make such a transfer of assets and the validity of a note given under such circumstances have been decided too often to justify further discussion of the matter."

(1) That the note in question did represent a real obligation is expressly admitted by the Office of the Comptroller of the Currency. See letter of instructions to the Receiver (R. 531).

V.

**WITH RESPECT TO THE SO-CALLED
"TAX SAVINGS".**

Eliminating the matter of compensation for administration (not presently presented), the only matter raised by the appeal was the ruling of the District Court holding petitioner liable for "tax savings" and interest. On this, the Circuit Court of Appeals affirmed, Judge Waller again dissenting (R. 810). A brief explanation of the issue is necessary.

The contract under which the assets were taken over provided (R. 14) for a conveyance to the new bank of all assets of every kind of the old institution including "real estate * * * and all other property and evidence of property of whatsoever nature and where-soever located".

For further assurance, the old bank agreed to

"execute and deliver any deed or other document, and to do any other lawful thing considered necessary or desirable to make legal the transfer of assets herein provided for and to put the title to same in Party of the Second Part".

Conformably to this obligation, deeds were executed by the Commercial National Bank of Shreveport to the Commercial National Bank in Shreveport to all realty of every description then standing in the name of the old bank, and those deeds were placed of record.

The contract had been laid before and approved by a meeting of the stockholders, wherein appeared counsel representing minority groups. That stockholders' meet-

ing expressly designated the agreement (R. 22; also 26) as "the sale of the assets of the bank", and three times in the minutes of the meeting of the stockholders appears reference to it as "agreement of sale", and again as "act of sale".

In *Phelan v. Wilson*, 114 La. 814, the Court recognized the doctrine (page 823) of innominate contracts which "yet convey ownership"; and that conveyances intended as security transfer "the legal title to the property and clothe them (i. e. the vendees) with authority to sell the same and apply the proceeds to the payment of certain debts and obligations".

That thereafter the real estate was properly assessed under the local law to the new institution is the express admission of the Receiver in his pleadings. See paragraph 12 of complaint (R. 5):

"Defendant bank, having acquired the legal title to the property transferred to it under the contract of December 3, 1932, and being primarily liable for the payment of taxes thereon, did, throughout all the period of time from the date of said contract, December 3, 1932, up to the present time, in making its return to the taxing authorities * * * set up as an asset belonging to it (a) all of the real estate transferred by the old bank under the contract of December 3, 1932 and (b) the capital stock of subsidiary corporations of the old bank, the assets of which consisted of real estate acquired for debt. *The value of said real estate and capital stock was set up in accordance with the applicable law.*" (Italics ours).

Thus, at the threshold, it is plain that the old bank clothed the new bank with the apparent—the legal and record—

title to these assets, and that they were properly and legally returned, and properly assessed.

The net result, however, of the assessment to the new bank of this realty was to reduce the burden of *ad valorem* taxes to the stockholders of the new institution. This, by reason of the federal permissive statute (*U. S. Code, Title 12, §548*) relating to state taxation of national banks.

See:

First National Bank v. Kentucky, 9 Wallace, 353;

First National Bank v. Anderson, 269 U. S. 341, 347;

Des Moines National Bank v. Fairweather, 263 U. S. 103, 106;

First National Bank of Shreveport v. Louisiana Tax Commission, 289 U. S. 60.

During the years here in question, the method of reaching capital employed in national banks for state taxes was that provided for in Act 221 of 1928, and in Act No. 6 of 1934, the provisions of which two statutes are, in this respect identical. These acts are set out in full in the Appendix to this brief. In substance (see *First National Bank of Shreveport v. Louisiana Tax Commission*, 289 U. S. 60), they provide for assessment against the shares of stock in national banks, and the deduction from the valuation of such shares of the book value of the real estate, which was to be assessed to the bank as such, at valuations fixed by the state taxing authorities.

The cause of action declared upon, was based upon contention that the deductions thus made from the assessment of the shares of stock resulted in savings of taxes to the new bank; that such savings were "fruits of the pledge" represented by the transfer of the realty; and that consequently they were to be accounted for by the new bank as trustee. The District Judge sustained this contention (R. 50-66; also R. 685); the majority opinion affirmed (R. 786-8); the minority opinion again dissenting (R. 809-11).

Petitioner respectfully avers that the decision below is erroneous in respect of important questions of law which may often arise in the administration of affairs of defunct or embarrassed national banks, and that such decision is, in one respect, inconsistent with applicable local law, and, in another, with express decisions of this Court respecting the construction of national banking laws.

(a) **As to the Local Law.**

The original opinion of the majority of the Court below starts (R. 785) with a statement that the "correct decision upon all issues depends upon the law of Louisiana". The Court then proceeds to find (R. 786) under that law, that petitioner was liable to the old bank for the so-called "tax savings" as constituting "fruits or revenue derived from the use of the trust property". For such ruling, the Court cites *Article 3168 of the Louisiana Civil Code*, which provides:

"The fruits of the pledge are deemed to make a part of it, and therefore they remain, like the pledge, in the hands of the creditor; but he can not appropriate them to his own use; he is bound, on the con-

trary, to give an account of them to the debtor, or to deduct them from what may be due to him",

and *Article 3176* of the same Code, which reads as follows:

"The antichresis shall be reduced to writing. The creditor acquires by this contract the right of reaping the fruits or other revenues of the immovables to him given in pledge, on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt."

But, with the utmost respect, it is submitted that the majority—as the dissenting opinion point out (R. 810)—entirely misconstrues the term "fruits" and "revenues"; such error, in turn, growing out of its failure properly to grasp the nature of the juridical root out of which the tax saving germinated. As the etymology of their terms would indicate, "fruits" are products of the thing itself: "revenues", earnings periodically arising from the thing pledged. In *Elder v. Ellerbe*, 135 La. 990, 994-5, the Court defined the term "fruits", as used in the law of Louisiana, as referring "to what is produced and reproduced from time to time, or in successive seasons", citing French commentaries to the effect "the fruits must be of things that are born and reborn of the soil".

Certainly a pledgee is liable to the pledgor for profit yielded by the thing itself, such as its increase or rents or other compensation for its use. But here, whatever saving of taxes was had was not through the use of the thing, or through its yield or increase and, consequently, was neither fruits nor revenues. The profit to the petitioner—if profit there was—did not arise out of the

pledged realty, and consequently was not something which the petitioner was equitably obligated to restore to the pledgor as issuing out of the pledge.

Nothing surreptitious was accomplished.⁽¹⁾ The old bank, through the actions of its directors (R. 15) and of its stockholders (R. 23) executed formal deeds to the new bank to the realty in question. Those deeds were placed of record. The complaint (R. 5) very properly admits the duty of the taxing authorities to assess to the new bank, as the owner of the legal title of record. The Deputy Comptroller of the Currency was cognizant of and approved (R. 298-301). That assessment was made. Taxes on the property were then paid by the new bank, and charged back to the old bank as part of the expense of administration. Of that, there is presently no complaint. This cost the old bank nothing. If the assessment had been in its name, it would have paid the same taxes, so that it neither gained nor lost by the arrangement. The assessment being thus properly made, and the taxes properly paid, the law of Louisiana required the taxing authorities to deduct, conformably to the permissive federal statute (*U. S. Code, Title 12, § 548*), the aggregate of the book value of the realty from the value of the capital stock in the assessment to the shareholders of the new bank.

That was the act of the law itself operating upon a valid contract between the parties.

(1) It is admitted (R. 527) that the agreement was approved *in toto* by the Comptroller of the Currency.

For whatever earnings issued out of the real estate in the way of profits on sales, or rents, or otherwise, proper accounting has admittedly been had. No question exists as to that. The real estate, as such, earned no part of the sum sued for. The acts of the parties, dealing at arm's length, the execution of formal deeds, the placing of these deeds on record, are indisputable. The Receiver's pleadings admit the propriety of the assessment, just as did the Deputy Comptroller of the Currency (R. 301) after the matter had been discussed with him by the predecessor Receiver of the old bank (R. 298). The opinion below states that the saving "clearly does not belong to the Trustee or its stockholders", but advances no legal reason why the Receiver should be entitled to it, except its dictum that "it was a profit derived from the trust property", and "was not within the contemplation of the parties at the time the contract was made" (R. 787). The first statement is clearly erroneous; the latter equally so. Contracting parties are presumed to have contemplated the results which the law attaches to their acts. And nothing in the contract between the parties, or in the equities of the situation, declares, suggests or implies any right of the old bank to that which, without fraud, was the act of the law itself. Especially is this the case when if the assessment had been made to the old bank, it would have paid the same taxes and would have received no benefit whatever in the way of tax savings.

The importance and the novelty of this question is, in the opinion of counsel, of that nature as to suggest the propriety of the review of the lower court's decision upon this issue.

(b) The Ruling of the Lower Court Is Inconsistent With Decisions of This Court.

Reference to the controlling state statute (Act 14 of 1917, Secs. 1, 2 and 4 of which (the only portions here relevant) are printed in the appendix) discloses that Louisiana, in availing herself of the permission granted by the federal statute (*U. S. Code, Title 12 § 548*) to derive revenue from moneyed capital employed in national banks, has provided for taxation of the shares of capital stock of such banks to be "assessed to the shareholders at the domicile or location of the bank": such taxes to be paid by the bank direct, "and it shall be entitled to collect the amount so paid from the shareholders or their transferees".

Thus, there can be no basis for contention that the petitioner, *as a corporation*, was the beneficiary of the deduction on which the Receiver hangs his right of action.

Such cases as *Des Moines National Bank v. Fairweather*, 263 U. S. 103, make it plain that the assessment is not merely in form, but in substance, one against the shareholders and not against the bank, as such:

"While the bank is required primarily to pay the tax on the shares, the statute shows that the payment is to be on behalf of the stockholders and that the bank is accorded ample means of enforcing reimbursement from them. It is on the stockholders that the burden ultimately rests."

(Page 112, citing *First National Bank v. Kentucky*, 9 Wallace, 361; *First National Bank v. Chehalis County*, 166 U. S. 440, 444; *Covington v. First National Bank*, 198 U. S. 100, 111, 112; *First National Bank v. Adams*, 258 U. S. 362).

Petitioner's stockholders were never made parties to this suit. These persons "on whom the burden of taxation ultimately rests" were the sole parties who benefited, *i. e.*, "saved" by the assessment. The defendant in the District Court, the petitioner here, was not the beneficiary. When it paid taxes on the shares, it did so not as tax debtor, but as the conduit nominated by the state law, through which payment of taxes should flow.

The decision below entirely ignores the cited decisions of this Court.

It is respectfully submitted that such decision on an important question directly connected with the winding up of national banks, inconsistent with repeated and applicable decisions of this Court, is again one in which the supervisory jurisdiction of this Court is properly to be exercised.

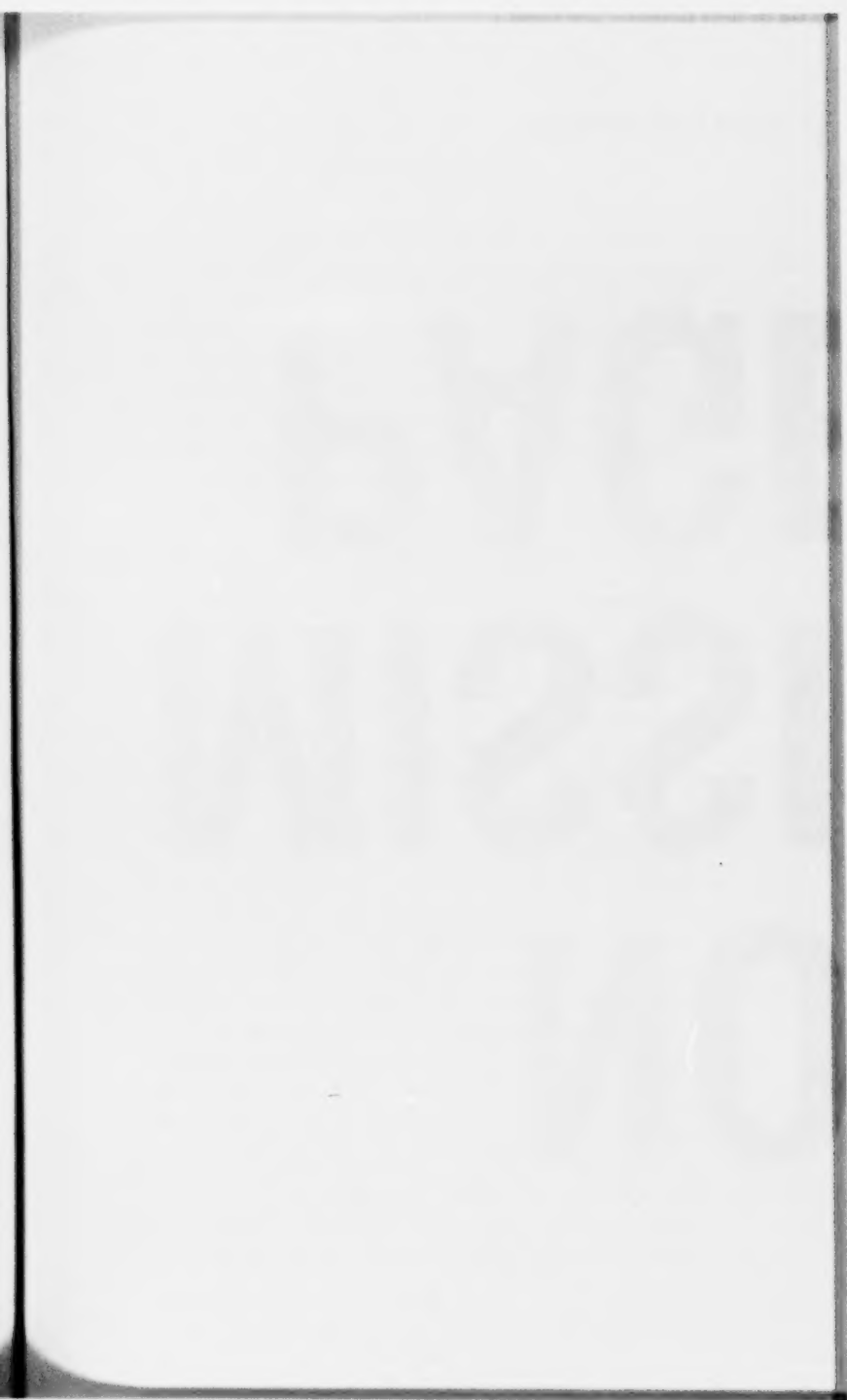
IN CONCLUSION.

For each and all of the above reasons, it is respectfully prayed that certiorari be granted.

Respectfully submitted,

SIDNEY L. HEROLD,
SIDNEY M. COOK,

Attorneys for Petitioner.





APPENDIX.**Act No. 14 of 1917.**

"Section 1. Be it enacted by the General Assembly of the State of Louisiana, That the shares of stock and the real estate of all banks, banking companies, firms, associations, or corporations doing a banking business in this State, chartered by the laws of this State or the United States, be and they are hereby declared subject to taxation for all purposes in the State of Louisiana.

"Section 2. Be it further enacted, etc., That no assessment shall hereafter be made against the capital stock, surplus, or undivided profits of any bank, banking company, firm, association, or corporation engaged in the banking business, chartered under the laws of this State, or the United States, doing business in this State, whose capital stock is represented by shares, but the shares shall be assessed at actual value or the same percentage of actual value as that fixed on other property for State and local assessment purposes, to the shareholders at the domicile or location of the bank, banking company, firm, association, or corporation, who appear as such upon the books, regardless of the domicile of the shareholder and regardless of any transfer not registered or entered upon its books. It shall be the duty of the president, vice-president, cashier, or assistant cashier of any such bank, banking company, firm, association, or corporation engaged in the banking business to furnish to the assessor, on or before Sept. 1st, 1917, and on or before the 20th day of January of each and every year thereafter a complete list sworn to of those who are carried on its books as shareholders. All taxes so assessed against the shares of stock shall be paid by the bank, banking company, firm, association, or corporation engaged in the banking business direct,

and it shall be entitled to collect the amount thus paid from the shareholders or their transferees.

* * *

"Section 4. Be it further enacted, etc., That the basis for arriving at the value of the said shares of stock in any bank, banking company, firm, association, or corporation engaged in the banking business shall be the value of said stock as shown by the statements of said bank, banking company, firm, association, or corporation, made to the Comptroller of the Currency and required to be published, in the case of banks, banking companies, firms, associations, or corporations, created under the laws of the United States, and the statement made to the Examiner of State Banks, and required published, in the case of banks, banking companies, firms, associations, or corporations, created under the laws of the State of Louisiana, less the value of the real estate owned by said banks, banking companies, firms, associations, or corporations, as shown on said statements, and all banks, banking companies, firms, associations, or corporations, engaged in the banking business, State or National, are hereby required to make and furnish on or before January 20th, of each and every year to the local assessor and to the Board of State Affairs a duly authenticated statement similar to those made by them as above set out to the Comptroller of the Currency or to the Examiner of State Banks, showing their conditions at the close of business on the 31st day of December of the previous year.

"Section 5. Be it further enacted, etc., That the banking house and all real estate shall be assessed directly to the Bank, banking company, firm, association, or corporation at actual value, or whatever percentage thereof is determined upon by the Board of State Affairs for State assessment purposes, and the local taxing authorities for local purposes,

without regard to the value of said property as shown on the statements of such banks, banking companies, firms, associations, or corporations, but which shall be equal and uniform with all other classes of property."

Act No. 221 of 1928.

"Section 1. Be it enacted by the Legislature of Louisiana, That Sections 4 and 5 of Act. No. 14 of 1917 be amended and re-enacted so as to read as follows:

'Section 4. That the basis for arriving at the value of the said shares of stock in any bank, banking company, firm, association, or corporation engaged in the banking business shall be the value of said stock as shown by the statements of said bank, banking company, firm, association, or corporation, made to the Comptroller of the Currency and required to be published, in the case of banks, banking companies, firms, associations, or corporations, created under the laws of the United States, and the statement made to the State Bank Commissioner, and required to be published, in the case of banks, banking companies, firms, associations, or corporations, created under the laws of the State of Louisiana, less the value, as shown on said statements, of the real estate owned by said bank, banking company, firm, association, or corporation, and less the value, as included in said statements, of the capital stock which (except directors' qualifying shares, if any) is owned by said bank, banking company, firm, association, or corporation, and all, or substantially all, the assets of which consist of real estate acquired for debt and/or the building or buildings in which are located the main and/or branch banking house or houses of said bank, banking company, firm, association, or corporation, and/or the land on which the same is situated and/or the furniture and fixtures located thereon and owned in connection therewith. All banks, banking companies, firms, associations, or corporations, engaged in the banking business, State or National, are hereby required to make and furnish, on or before January 20th of each and every year,

to the local assessor and to the Louisiana Tax Commission, a duly authenticated statement similar to those made by them as above set out to the Comptroller of the Currency or to the State Bank Commissioner, showing their conditions at the close of business on the 31st day of December of the previous year.

'Section 5. That the banking house and all real estate owned by any bank, banking company, firm, association, or corporation, shall be assessed directly to it at actual value, or whatever percentage thereof is determined upon by the Louisiana Tax Commission for State assessment purposes, and the local taxing authorities for local purposes, without regard to the value of said property as shown on the statements of such bank, banking company, firm, association, or corporation, but which shall be equal and uniform with all other property of the same class.'

"Section 2. That all laws or parts of laws in conflict herewith be and the same are hereby repealed."

Act No. 6 of 1934.

"Section 1. Be it enacted by the Legislature of Louisiana, That Section 4 of Act. No. 14 of the Extra Session of 1917, as amended and re-enacted by Act No. 221 of 1928, be amended and re-enacted so as to read as follows:

'Section 4. That the basis for arriving at the value of the said shares of stock in any bank, banking company, firm, association, or corporation engaged in the banking business shall be the value of said stock as shown by the statements of said bank, banking company, firm, association, or corporation, made to the Comptroller of the Currency and required to be published, in the case of banks, banking companies, firms, associations, or corporations, created under the laws of the United States, and the statement made to the State Bank Commissioner, and required to be published, in the case of banks, banking companies, firms, associations, or corporations, created under the laws of the State of Louisiana, less the value, as shown on said statements, of the real estate owned by said bank, banking company, firm, association, or corporation, and less the value, as included in said statements, (1) of the preferred stock issued by any such bank and actually owned by the United States of America or any agency thereof, and (2) of the capital stock and obligations of any corporations, all the capital stock of which (except directors' qualifying shares, if any) is owned by said bank, banking company, firm, association, or corporation, and all, or substantially all, the assets of which consist of real estate acquired for debt and/or the building or buildings in which are located the main and/or branch banking house or houses of said bank, banking company, firm, association, or corporation, and (or the land on which the same is situated and/or the furniture and fixtures located thereon and

owned in connection therewith. All State or National banks, banking companies, firms, associations, or corporations, engaged in the banking business are hereby required to make and furnish, on or before January 20th of each and every year, to the local assessor and to the Louisiana Tax Commission, a duly authenticated statement similar to those made by them as above set out to the Comptroller of the Currency or to the State Bank Commissioner, showing their condition at the close of business on the 31st day of December of the previous year.'

"Section 2. All laws or parts of law in conflict herewith are hereby repealed."



(10)

Office - Supreme Court, U.S.

FILED

DEC 19 1944

CHARLES ELMORE CROPL
OLEA

Supreme Court of the United States

OCTOBER TERM, 1944

No. 718

COMMERCIAL NATIONAL BANK IN SHREVEPORT,
Petitioner,

versus

R. C. PARSONS, RECEIVER OF COMMERCIAL
NATIONAL BANK OF SHREVEPORT,

and

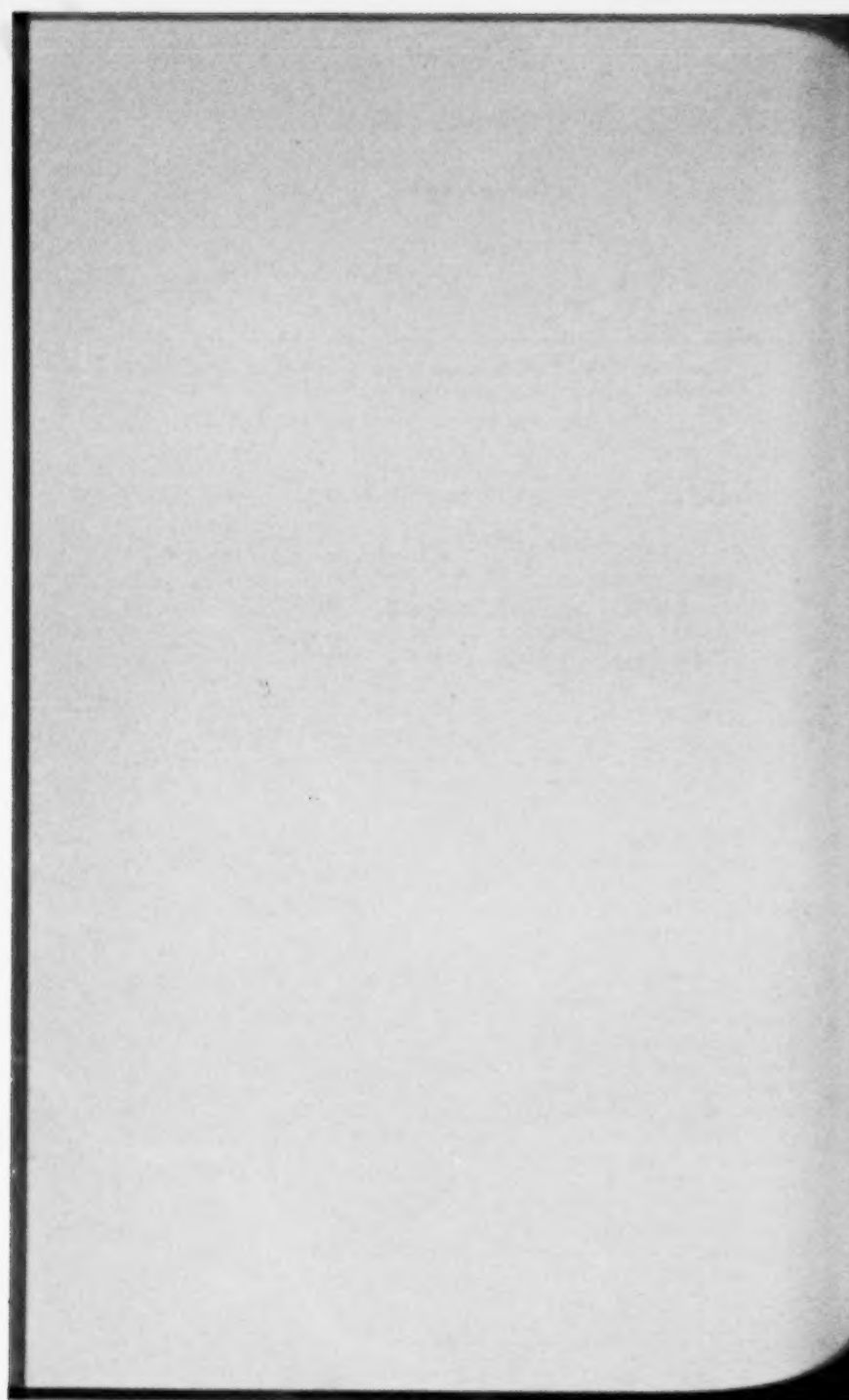
RANDLE T. MOORE, ET ALS., AS STOCKHOLDERS'
COMMITTEE OF COMMERCIAL NATIONAL
BANK OF SHREVEPORT,

Respondents.

BRIEF ON BEHALF OF R. C. PARSONS, RECEIVER,
IN OPPOSITION TO PETITION FOR
WRITS OF CERTIORARI

PIKE HALL,
MONTE M. LEMANN,
*Attorneys for R. C. Parsons,
Receiver, Respondent.*

MONROE & LEMANN,
FOSTER, HALL & SMITH,
Of Counsel.



Subject Index

	Page
Statement of the Case	1
Proceedings in the Lower Courts	5
Argument	8
1. Certiorari Will Not Ordinarily Issue to Review an Interlocutory Order. There has been no Final Decision Below	8
2. In an Equity Case Reversed Generally, the Circuit Court of Appeals Had Clear Power to Indicate Its Views upon the Law of the Case Notwithstanding There was No Cross-Appeal	10
3. A Court May, and Indeed Should, Disregard Admissions of Counsel on Questions of Law Where Such Admissions Are Deemed Erroneous	18
4. The Opinion of the Court of Appeals Is Not, on The Special Facts of This Case, Contrary to Any Local Law, Statute or Decision	20
5. There Is No Conflict Between the Decision in This Case and Decisions in Other Circuit Courts of Appeal	23
6. There Was No Error in The Decision Upon the Tax Point; the Old Bank Was Clearly Entitled to the Benefit of the Tax Saving Made Through the Use of its Property	25

Table of Cases and Authorities

Aberly v. Craven County, 70 F. (2d) 52	23
American Construction Company v. Jacksonville, etc., Railway Company, 148 U. S. 372	9
Anderson v. Abbott, 321 U. S. 348	28
Barnett, In re, 124 F. (2d) 1005	15, 19
Bank of California v. Richardson, 248 U. S. 476	28
Calhoun County, Fla. v. Roberts, 137 F. (2d) 130	13, 14
Canadia, The, 241 Fed. 233	11
Central Improvement Co. v. Cambria Steel Co., 201 F. 811	16
Commercial Bank v. Chambers, 182 U. S. 556	28
Crites, Inc. v. Prudential Ins. Co., 322 U. S. 408	23
Duke Power Co. v. Greenwood, 91 F. (2d) 665	16
Fleniken v. Great American Indemnity Co., 142 F. (2d) 938	14
Hamilton-Brown Shoe Co. v. Wolf Brothers & Co., 240 U. S. 251	9
Hanover Star Milling Co. v. Metcalf, 240 U. S. 403	9
Hawkins v. Cleveland, 99 Fed. 322	16
Hightower v. American National Bank, 254 Fed. 249, 276 Fed. 371, 263 U. S. 351	24

Table of Cases and Authorities—Continued

	Page
Illinois Power & Light Corp. v. Hurley, 49 F. (2d) 681.....	16
In re Barnett, 124 F. (2d) 100.....	15, 19
Irvine v. The Hesper, 122 U. S. 256.....	11
Jackson v. Ludeling, 21 Wall. 616.....	21
Jones v. St. Paul Fire & Marine Co., 108 F. (2d) 123.....	14
Keller et als v. Potomac Electric Power Co., 261 U. S. 428.....	16
Langnes v. Green, 282, U. S. 531.....	10, 12
Mackenzie v. A. Englehard & Sons Co., 266 U. S. 131.....	16
Madden Furniture Co. v. Metropolitan Life Insurance Co., 127 F. F. (2d) 837.....	14
Michoud v. Girod, 4 How. 503.....	21
Munson S. S. Line v. Miramar, 167 Fed. 960.....	11
Newcomb v. Burbank, 182 Fed. 954.....	16
New Orleans v. Houston, 119 U. S. 265.....	23
New York Central Railroad Company v. Johnson, 279 U. S. 310.....	16
Pepper v. Litton, 308 U. S. 295.....	28
Reid v. Fargo, 241 U. S. 544.....	11
Richter v. Laredo National Bank, 62 F. (2d) 289.....	24
Roth v. H'er, 142 F. (2d) 227.....	14
Sanford, Estate of, v. Commissioner, 308 U. S. 39.....	19
Schuykill Trust Company v. Pennsylvania, 296 U. S. 113, 302 U. S. 506.....	28
Securities and Exchange Commission v. United States Realty & Improvement Company, 310 U. S. 434.....	15
Standard Oil Co. of N. J. v. Southern Pacific et als, 268 U. S. 146.....	11
Swift & Co. v. Hocking Valley R. R. Co., 243 U. S. 281.....	19
Townsend, The, 29 F. (2d) 491.....	11
Trustees of Somerset Academy v. Picher, 90 F. (2d) 741.....	23
Twohy, The John, 255 U. S. 77.....	11
Virgin, The, 8 Pet. 538.....	12
Watts, Watts & Co., v. Unione Austriaca di Navigazione, etc., 248 U. S. 9.....	11
Weeks v. Pratt, 43 F. (2d) 53.....	14
Weil v. Neary, 278 U. S. 160.....	22
Woods v. City Bank Co., 312 U. S. 262.....	23

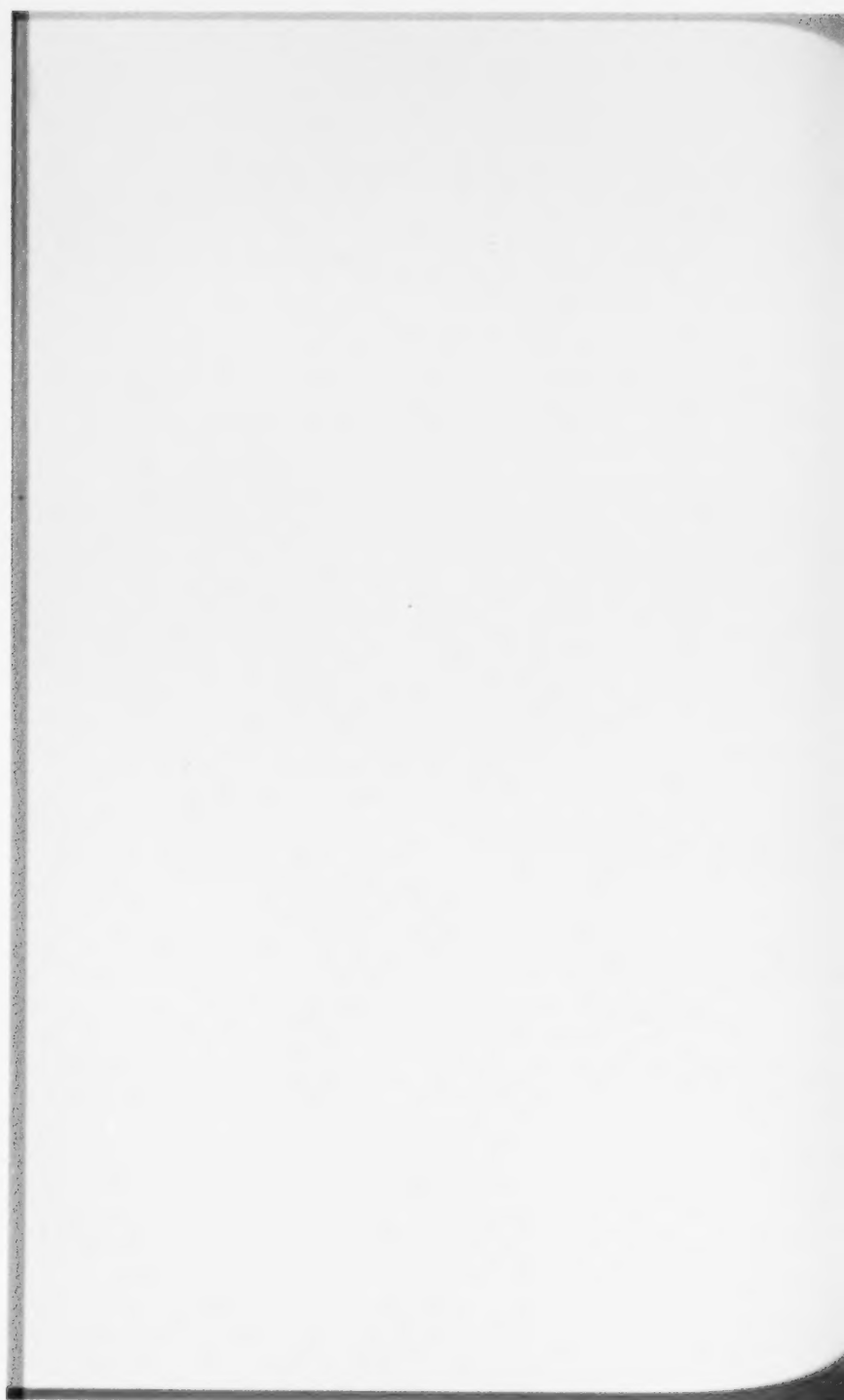
Louisiana Statutes:

	Page
Civil Code of Louisiana.....	
Article 21.....	21
Article 2924.....	20
Article 3168.....	25
Article 3176.....	25
Dart's Louisiana General Statutes, Section 685.....	27

Table of Cases and Authorities—Continued

Miscellaneous:

	Page
American Jurisprudence, Vol. 13, Section 70, Page 160	28
American Law Institute	
Restatement of Agency, Section 404	29
Restatement of Restitution, Article 1, page 12	26
Restatement of Security, Comment to Section 22	26
Restatement of Trusts, Section 203, 206 (j)	26, 29
Denis, Contract of Pledge, Sections 205, 206	25
Federal Rules of Civil Procedure	
Rule 14 (a)	29
Rule 73 (b)	16
Fletcher, Cyclopedia of Corporations, Vol. 1, pages 139, 165	28
Internal Revenue Code, Section 23 (d)	28
Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States	3, 8, 12



Supreme Court of the United States

OCTOBER TERM, 1944

No. 718

COMMERCIAL NATIONAL BANK IN SHREVEPORT,
Petitioner,

versus

R. C. PARSONS, RECEIVER OF COMMERCIAL
NATIONAL BANK OF SHREVEPORT,

and

RANDLE T. MOORE, ET ALS., AS STOCKHOLDERS'
COMMITTEE OF COMMERCIAL NATIONAL
BANK OF SHREVEPORT,

Respondents.

**BRIEF ON BEHALF OF R. C. PARSONS, RECEIVER,
IN OPPOSITION TO PETITION FOR
WRITS OF CERTIORARI**

STATEMENT OF THE CASE

This is a suit in equity for an accounting. The plaintiff is the Receiver, appointed by the Comptroller of the Currency, for Commercial National Bank of Shreveport, hereinafter referred to as the old bank. The defendant is the Commercial National Bank in Shreveport, hereinafter referred to as the new bank.

The facts are largely summarized in the opinions of the District Court (R. 50, 684) and the Court of Appeals

(R. 784, 822).¹ We believe it will aid the Court, however, to summarize here the more important facts.

The basis of the suit is a contract dated December 3, 1932, between the old bank and the new bank. The new bank was organized for the purpose of acquiring and taking over the old bank. Its organizers consisted of the old bank's officers and a number of its directors and stockholders, and the executive vice-president of the new bank (who had occupied a corresponding position in the old bank), drafted the contract (R. 474). The old bank had a capital of \$1,000,000 and so did the new bank. Most of the new bank's capital was obtained from the old bank on the day it closed by a loan which the organizers of the new bank that day obtained from the old bank.²

The contract provided that the old bank should transfer all of its assets to the new bank in order that the latter might liquidate the same. The new bank assumed all of the obligations of the old bank. The contract provided that when the new bank should have collected from the old bank's assets

"an amount sufficient to **indemnify**³ itself for the liability herein and hereby assumed, including expenses and a reasonable fee as hereinabove provided",

the residue of the assets should be delivered to the Stockholders' Committee of the old bank or liquidated for its account (R. 19). Contracts resembling this one in some features are not uncommon, being designed to ac-

¹The opinions of the District Court (R. 50, 684) are reported under the titles *Leslie v. Commercial National Bank*, 28 F. Supp. 927 (1939) and *Rawlings v. Commercial National Bank of Shreveport*, 44 F. Supp. 5 (1942). Leslie and Rawlings were, successively, receivers of the old bank prior to the appointment of the present receiver, R. C. Parsons.

The original opinion of the Court of Appeals (R. 784) is reported at 144 F. (2d) 231 (1944). The opinion on rehearing (R. 822) is not yet officially reported.

²The notes representing this loan were part of the assets turned over to the new bank for liquidation and were paid in due course.

³Black lettering throughout this brief is that of the authors of the brief unless otherwise indicated.

comply with the orderly liquidation of the assets of a bank so as to avoid the necessity of the appointment of a receiver. But we have been unable to find in the reported cases any other case in which there was a contract containing the peculiar provisions of the present contract or in which the circumstances of liquidation corresponded to the circumstances of the present case.⁴

Apart from the tax item hereinafter referred to, the controversy here derives from the unique provision of the contract in this case, that the new bank should be entitled to interest at the rate of six per cent per annum on Class B assets of the old bank. The contract provided for the division of the assets of the old bank into three classes, A, B, and C. Class A was made up of cash and items (such as Government bonds) considered equivalent to cash. Class B was made up of other assets in an amount which when added to the Class A assets would equal the obligations of the old bank assumed by the new bank. Class C was made up of the remaining assets of the old bank. (R. 17-19).

The total obligations of the old bank assumed by the new bank, consisting chiefly of liabilities for deposits, amounted to \$13,479,610.53 (R. 692). The total assets of the old bank had a face value of \$15,473,678.41.⁵ On book values, therefore, the old bank had an excess of assets over liabilities amounting to approximately two million dollars.

Although there was thus an apparent surplus of assets transferred over liabilities assumed, the contract provided that the old bank should execute and deliver to

⁴*Certiorari* does not ordinarily issue in a case which is peculiar upon its facts and may never arise again. See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, pages 534 and 536, and cases therein cited.

⁵R. 691 shows total assets of \$16,473,678.41. This, however, includes the \$1,000,000 note hereinafter referred to which was only a symbol and to represent which no moneys came into the hands of the old bank. Of the old bank's total assets of \$15,473,678.41, cash and similar items amounted to \$3,435,799.54.

the new bank a note of one million dollars as an additional guarantee to the new bank. The amount of this note corresponded to the amount of the capital of the old bank, for which under the then law an assessment against stockholders of the old bank might have been made. No money was advanced against this note; it was merely a symbol used to represent the maximum enforceable liability that the old bank would have been under if its assets had fallen short of its liabilities. As a matter of fact, the assets transferred proved more than sufficient to extinguish all obligations of the new bank, plus charges made by the new bank aggregating \$1,311,346.64, and after paying all these sums to leave a substantial balance in the hands of the new bank.

The charges aggregating \$1,311,346.64 were arrived at by computing interest at the rate of six per cent per annum on Class B assets in accordance with the provisions of Article V of the contract (R. 18-19). As a result of these provisions the new bank with a capital of only one million dollars (most of which was obtained from the old bank's assets, as above set out) began immediately to set up charges of six per cent per annum on Class B assets, which assets on the day the new bank started business amounted to approximately ten million dollars (R. 353). Thus the new bank built up charges during the life of the contract amounting to \$1,311,346.64.⁶

Pursuant to the contract, the real estate of the old bank was transferred into the name of the new bank. The new bank returned the real estate for assessment for local taxes as if it were its property. Under Louisiana law the shares of stock in the new bank were subject

⁶The symbolic million dollar note was for a time included in Class B assets and for a time in Class A. (R. 351).

While the note was in Class A assets, the new bank charged 6% interest upon it as it would have done upon any other note, although it represented no real loan. While it was in Class B assets, it was part of the total on which the charge of 6% per annum was figured.

to local assessment, but in calculating the value of said shares for assessment purposes, a deduction could be taken for real estate assessed to the bank. The new bank thus used the real estate of the old bank to reduce the taxes on its stock and thereby saved \$191,778.55. This saving increased the surplus and undivided profits of the new bank.

PROCEEDINGS IN THE LOWER COURTS

In its original petition the old bank sought a general accounting, complaining particularly of the excessive charges made by the new bank for so-called interest, exceeding \$1,300,000, and the failure of the new bank to give credit for the taxes saved through use of the old bank's property (R. 1 to 12). By a supplemental and amended petition the old bank alleged that the charges made by the new bank were usurious (R. 45).

The new bank filed a motion to strike the allegations of the petition regarding the tax savings. This motion was denied by the District Judge with written reasons (R. 50), reported in 28 F. Supp. 927. Thereupon the new bank answered claiming a credit which gave effect to the charges of \$1,311,346.64, above referred to, and also claiming additional credits aggregating \$284,353.02 for services in administering Class C assets and for pro-rata of salaries in administration of Class B and Class C assets (R. 39, 66 ff.)

The case was tried on the merits in due course. The District Court rendered an opinion (R. 684), reported in 44 F. Supp. 5, holding that the old bank was entitled to the benefit of the tax savings which had been obtained by the use of its property. The Court rejected the claims of the defendant bank for additional compensation. It did not accord the old bank any relief

from the new bank's charges aggregating \$1,311,346.64.⁷ The District Court directed the defendant to file an account in accordance with the rulings made by the Court in its opinions shown at R. 50, 684.

An account was in due course filed by the defendant and a decree entered providing for the recovery by the plaintiff from the defendant of sums aggregating \$509,114.49, with interest from various dates (R. 762).

The new bank gave the following notice of appeal:

"Notice is hereby given that the Commercial National Bank in Shreveport, the defendant above named, hereby appeals to the Circuit Court of Appeals for the Fifth Circuit from the final judgment entered in this section on April 13, 1943." (R. 765.)

This was an appeal from the entire judgment, not a part of it. No cross-appeal was filed. The appellant designated the entire record to be presented to the upper court (R. 782).

In its brief in the appellate court the appellant asked that the case "be remanded to the lower Court for a trial **on the merits** and adjudication as to the amount properly allowable to the defendant for administration of the Class C assets and for salaries provided for in the amended contract and **for final accounting**."⁸

The Circuit Court of Appeals, one judge dissenting, held that the decree of the District Court should be reversed because the court had rejected the claim of the

⁷Counsel for the Receiver had stated to the District Court that while of the opinion that these charges were grossly excessive, they could find no adequate legal basis for relief from the express provisions of the contract with respect thereto. The District Court in its opinion described the contract as "harsh" and stated that the plaintiff had sought "the application of such equitable considerations as the circumstances demand", but did not accord any relief with respect to the charges of \$1,311,346.64. (R. 694).

⁸See language of the appellant quoted in the opinion on rehearing of the Court of Appeals, R. 822.

defendant for an allowance for administration of Class C assets. The case was "remanded generally * * * for further proceedings not inconsistent with the opinion of this Court. * * *" (R. 812).

In its opinion, the Court of Appeals indicated its view that upon a new trial the old bank would be entitled in equity to relief from the charges aggregating \$1,311,346.64. The Court of Appeals held that its **power** to review the entire case and to indicate the principles which should govern the District Court upon a new trial was not affected by the fact that the old bank had not taken a cross-appeal, the proceeding being one in equity and the case being remanded generally for trial on the merits upon a general appeal taken by the new bank. The defendant new bank now applies for *certiorari*.

Our opposition to the granting of *certiorari* proceeds upon the following grounds:

(1) *Certiorari* will not ordinarily issue to review an interlocutory order. There has been no final decision below.

(2) In an equity case which is reversed generally and remanded for a new trial at the request of the appellant, the absence of a cross-appeal did not deprive the appellate court of the power to indicate its views upon the law of the case to be applied upon the new trial.

(3) A court may, and indeed should, disregard admissions of counsel on questions of law where such admissions are deemed erroneous.

(4) The opinion of the Court of Appeals is not, on the special facts of this case, contrary to any local law, statute or decision.

(5) The opinion of the Court of Appeals is not contrary to the decision of any other Circuit Court of Appeals.

(6) There was no error in the decision upon the tax point; the old bank was clearly entitled to the benefit of the tax saving made through the use of its property.

ARGUMENT

We respectfully submit that petitioner makes out no case for the granting of *certiorari* for the following reasons:

1. *Certiorari Will Not Ordinarily Issue to Review an Interlocutory Order. There Has Been No Final Decision Below.*

The opinion and judgment of the Court of Appeals entered no final order against the defendant bank. The Court of Appeals merely reversed the judgment of the District Court and remanded the case for further proceedings not inconsistent with the opinion of the Court. Thus there is no final decree in the case and the decision which this Court is asked to review is one directing the entry only of an interlocutory order.

We recognize that *certiorari* may be granted to review an interlocutory order. But the general rule is that the absence of finality is a circumstance which ordinarily will influence the court to refuse the writ. See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, page 623.

"Whether *certiorari* shall be granted to review a non-final judgment or decree of the Circuit Court of Appeals raises a question of propriety, not of power. Power exists in the Supreme Court to issue the writ whether the judgment or decree of the Circuit Court of Appeals is or is not a final disposition of the controversy. But the Court has repeatedly said (especially in its earlier decisions) that 'except in extraordinary cases, the writ is not issued until final decree,' and has warned that the

circumstance that the decision of the Circuit Court of Appeals is not a final one is 'a fact that of itself alone furnished sufficient ground for the denial of the application.' It has pointed out that on *certiorari* to review a final decree of a Circuit Court of Appeals it can reach back to correct errors occurring in the interlocutory proceedings, and that neither the failure of parties to apply for *certiorari* to review an interlocutory ruling nor the denial by the Court of an application made at that stage affects the right to issue the writ to review the final decision of the court below, nor the scope of review on such writ."

This statement is fully supported by the cited cases. See *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U. S. 251, 258 (1916); *Hanover Star Milling Co. v. Metcalf*, 240 U. S. 403, 408, 409 (1916); and *American Construction Company v. Jacksonville, etc., Railway Company*, 148 U. S. 372, 383, 384 (1893).

In the case last cited the Court said:

"Whether an interlocutory order may be separately reviewed by the appellate court in the progress of the suit, or only after and together with the final decree, is matter of procedure rather than of substantial right; and many orders made in the progress of a suit become quite unimportant by reason of the final result, or of intervening matters. Clearly, therefore, this court should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

This language is directly applicable in the present situation where the case goes back for an entirely new trial.

2. *In an Equity Case Reversed Generally, The Circuit Court of Appeals Had Clear Power to Indicate Its Views Upon the Law of the Case Notwithstanding There Was No Cross-Appeal.*

The petition for *certiorari* relies chiefly on the contention that the Circuit Court of Appeals had no power to pass upon issues not raised by cross-appeal. Petitioner cites (p. 5 of its brief) cases holding that in the absence of cross-appeal an appellee has no right to be heard upon issues decided against him. But these cases are beside the point. The appellee here had no right to be heard upon matters with respect to which he had not filed a cross-appeal; but the absence of a cross-appeal did not at all affect the **power** of the appellate court, of its own motion, to deal with all the issues presented by the case, notwithstanding the fact that there was no cross-appeal raising some of such issues.

The argument for the petitioner ignores the distinction to be taken between (a) the **right** of an appellee to be heard without a cross-appeal and (b) the **power** of a court of equity, upon a general reversal, to indicate its views upon the law of the case, regardless of the fact that these views would result in the appellee's obtaining upon a retrial a recovery greater than that granted him by the District Court in a decree from which no cross-appeal was filed.

We, of course, concede that in the absence of a cross-appeal appellee has no **right** to claim relief beyond that awarded him by the lower court. This is the effect of the cases cited by the petitioner, but those cases do not touch the point here involved.

The distinction thus ignored by the petitioner has been emphasized by this Court. See *Langnes v. Green*, 282 U. S. 531, 538 (1931), where this Court, after reviewing

a number of the cases relied upon by the petitioner in this case, said at page 538:

"These decisions simply announce a rule of practice which generally has been followed; but none of them deny the **power** of the court to review objections urged by respondent, although he has not applied for *certiorari*, if the court deems there is good reason to do so." (Emphasis by the Court.)

In *Irvine v. The Hesper*, 122 U. S. 256 (1886), this Court said:

"We do not think that the fact that the claimants did not appeal from the decree of the District Court alters the rule. When the libellants appealed they did so in view of the rule, and took the risk of the result of a trial of the case *de novo*. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

The same rule was applied in *Reid v. Fargo*, 241 U. S. 544 (1916), and in *The John Twohy*, 255 U. S. 77 (1921). See also *Standard Oil Co. of N. J. v. Southern Pacific et als*, 268 U. S. 146 (1925); *Watts, Watts & Co. v. Unione Austriaca di Navigazione, etc.*, 248 U. S. 9 (1918), where the Court said:

"This court, in the exercise of its appellate jurisdiction, has power not only to correct error in the judgment entered below, but to make such disposition of the case as justice may at this time require. * * *

The cases which we have just cited were all cases in admiralty; other admiralty cases applying the same rule in Courts of Appeal are *Munson S. S. Line v. Miramar*, 167 Fed. 960 (C.C.A. 2, 1909); *The Townsend*, 29 F (2d) 491 (C.C.A. 2, 1928); *The Canadia*, 241 Fed 233 (C.C.A 3, 1917). But courts of admiralty proceed upon equitable principles and according to the rules of natural justice,

and it would be anomalous to contend that principles of equal breadth should not apply in a proceeding in equity. Compare *The Virgin*, 8 Pet. 538, 549 (1834).

In *Langnes v. Green*, *supra*, 282 U. S. 531, 538, this Court's language unmistakably indicated its view that the broad power of an appellate court upon appeal was not limited to admiralty cases. This is apparent not only from the language of the court in the *Langnes* case, but from the fact that this language followed the citation of cases which did not arise in admiralty.

The broad scope of the rule is recognized in the practice of this Court. See Robertson and Kirkham, Jurisdiction of the Supreme Court of the United States, p. 803:

"In the absence of a cross petition respondent is not entitled to be heard in opposition to the parts of the decision of the court below which were adverse to him, the general rule applied by the Supreme Court being that consideration of the case will be confined to an examination of errors asserted by petitioner where respondent has failed to present a cross petition for *certiorari*. The Court has stated, however, in a careful and well reasoned *dictum*, that these decisions simply announce a rule of practice which generally has been followed, without denying the *power* of the Court to review objections urged by respondent to the decree below, although he has not applied for *certiorari*, if the Court deems there is good reason to do so."

Citing *Langnes v. Green*, 282 U. S. 531, 535-538; *Lutcher & Moore Lumber Company v. Knight*, 217 U. S. 257, 267; *Delk v. St. Louis & San Francisco R. Co.*, 220 U. S. 580; *Baker v. Warner*, 231 U. S. 588, 593; *Watts, Watts & Co. v. Unione Austriaca di Navigazione*, 248 U. S. 9, 21, 39.

Before its decision in this case the Circuit Court of Appeals for the Fifth Circuit had recognized the broad effect of the language of this Court in the *Langnes* case.

See *Calhoun County, Fla. v. Roberts*, 137 F. (2d) 130 (1937). In that case, as in this one, the court asserted and exercised its **power** to direct a disposition of the case which had the effect of enlarging the rights of an appellee who had filed no cross-appeal, saying:

"We acknowledge the general rule that a cross appeal or cross *certiorari* is necessary to enable an appellee or respondent in *certiorari* to ask the appellate court to reverse the part of a decree which is unfavorable to him. *Morley Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185, 57 S. Ct. 325, 81 L. Ed. 593. The rule was applied even to an admiralty decree, the appeal from which is a *de novo* trial, in *The Maria Martin* (*Martin v. Northern Transportation Co.*), 12 Wall. 31, 20 L. Ed. 251. But in another case in admiralty, *Langnes v. Green*, 282 U. S. 531, 51 S. Ct. 243, 75 L. Ed. 520, by way of considered dictum, it was declared that the rule is one of the practice generally followed, limiting the rights of litigants, but not a restriction on the power of the appellate court to see that justice is done. We are reversing the conclusion of law of the district judge that the recourse is against the County and we esteem it necessary to justice to reopen his conclusion of law that there was no recourse against any bond proceeds in the balance of the Construction Fund. We act on our own motion, and not at the instance of appellee. We have disturbed no fact finding of the district court (as was done in the *Morley Construction Company* case), but differing only on the law, we propose to apply in all its consequences the law as we see it. We hold we have the power, without cross appeal, to do this."⁹

The Circuit Court of Appeals for the Fifth Circuit has repeatedly taken a similar position in other cases and its practice in this regard is well settled.

⁹Judge Waller concurred in this opinion. We are unable to reconcile his dissent on the procedural point in the present case with his concurrence in the cited case.

In *Weeks v. Pratt*, 43 F. (2d) 53 (1930), the Court said:

"This is an appeal in equity. The whole case is before us and we may render such decree as may be just and proper in the premises."

In *Jones v. St. Paul Fire & Marine Co.*, 108 F. (2d) 123 (1940), the court said in speaking of the effect of a prior reversal:

"It was in an equity case in which all the evidence theretofore taken stood good and only the judicial conclusion upon it was wiped out. The parties were free on such reversal to present by amendment new issues, if not inconsistent with what the appellate court had adjudged."

See also *Madden Furniture Co. v. Metropolitan Life Insurance Co.*, 127 F. (2d) 837 (1942); *Calhoun County, Fla., v. Roberts*, 137 F. (2d) 130 (1943) cited *supra*, p. 13, *Roth v. Hyer*, 142 F. (2d) 227 (1944); *Fleniken v. Great American Indemnity Co.*, 142 F. (2d) 938 (1944).

In the case last cited, the court maintained the right of an appellee to amend pleadings after the case had been remanded, saying:

"The court could have made a final adjudication of the issue of liability on the record before it, and ordered that only the amount of damages be tried. It did not do that, but reversed and annulled the only judgment there was and ordered further consistent proceedings. The question is, what proceedings will be consistent? 'Generally, when a case is reversed and remanded for further proceedings, it goes back to the trial court and there stands on the issues as if the former trial had not taken place. In the absence of any direction limiting the new trial to particular issues the whole case is tried anew, in pursuance of the principles of law disclosed in the opinion of the appellate court, which must be regarded as the law of the case on the second trial.' 3 Am. Jur., Appeal and Error, §1240."

The power of the court to decide issues not raised by an independent appeal was strikingly exercised by the Circuit Court of Appeals for the Second Circuit in a bankruptcy case. See *In re Barnett*, 124 F. (2d) 1005. In that case the court stated the applicable rule in the following language:

"In declining to make a narrow disposition of this appeal, which will afford only inadequate relief to the parties and leave in effect a truncated order, we are in part guided by the fact that a court of bankruptcy is a court of equity,¹⁰ and that once a court of equity has taken jurisdiction of a case, it will endeavor, in order to do justice, to dispose harmoniously of all its aspects. It is established doctrine, furthermore, that in disposing of a case before it, an appellate court has a broad power 'to make such disposition * * * as justice requires.' * * *" (124 F. (2d) at p. 1009).

The court then adverted to what has been termed the "sporting theory of justice" and indicated its dissent therefrom, saying:

"But we think that courts, in civilized communities should do more than decide cases, one way or another, without regard to considerations of justice, merely to prevent private brawls and breaches of the peace. Government having, through its courts, established in large areas, a monopoly of dispute-deciding, should try, as far as possible, to decide cases correctly—both by ascertaining the actual facts, as near as may be, and then by applying correct legal rules in an effort to do justice to the parties affected by their decisions. And not merely the parties, but the public as well, are interested that justice shall be done. The Supreme

¹⁰That a bankruptcy court is a court of equity is not in doubt. See *Securities and Exchange Commission v. United States Realty & Improvement Company*, 310 U. S. 434 (1939). The same considerations that control the actions of a bankruptcy court are *a fortiori* applicable in a proceeding in equity.

Court has said that 'a trial in court is never * * * purely a private controversy * * * of no importance to the public.'"¹¹ (124 F. (2d) p. 1010.)

As the Court of Appeals pointed out, in this case the new bank took a general appeal from the decree below. It did not appeal only from a part of the judgment as it might have done, FRCP Rule 73 (b). The reversal granted was a general reversal. Upon such a reversal the case is to be tried *de novo* and is in the same position in the lower court as if no decree had been entered there. This would be true even in an action at law; it is even more obviously true in a proceeding in equity. See *Illinois Power & Light Corp. v. Hurley*, 49 F. (2d) 681 (C.C.A. 8, 1931); *Hawkins v. Cleveland*, 99 Fed. 322, 324 (C.C.A. 7, 1900); *Newcomb v. Burbank*, 182 Fed. 954 (C.C., N.Y., 1910); *Central Improvement Co. v. Cambria Steel Co.*, 201 (Fed.) 811, 818 (C.C.A. 8, 1912); *Duke Power Co. v. Greenwood*, 91 F. (2d) 665 (C.C.A. 4, 1937). In the case last cited the court, through Judge Parker, said:

"The setting aside of the decrees in the District Court left the cause in precisely the position that it would have occupied if no final decree had ever been entered; and we think there can be no doubt as to the power of the court in an equity cause, until final decree has been entered, to hear additional evidence and modify or set aside any finding of fact theretofore made. * * * "

This Court has itself also recognized that an appeal in equity is a proceeding in continuation of the original suit; see *MacKenzie v. A. Englehard & Sons Co.*, 266 U. S. 131, 142 (1924); compare *Keller et als. v. Potomac Electric Power Co.*, 261 U. S. 428, 443 (1923).

In the light of the foregoing authorities, there can be no question as to the power which the District Court had,

¹¹Citing *New York Central Railroad Company v. Johnson*, 279 U. S. 310, 318 (1929).

upon a general reversal and remand of the case, to try the case *de novo* and to permit amendments to pleadings and the assertion of new claims. What logical ground could then be assigned for denying to the Court of Appeals the right to indicate the principles which in its opinion should control the District Court upon a trial *de novo*?

When the new bank took a general appeal from the judgment of the lower court and thus applied for a reversal, it took its chances that upon a reversal the case might be tried again and that the result upon the new trial might be less favorable to it than upon the original trial. This is the sort of risk incident to many decisions in a lawsuit at various stages. Whenever a defendant against whom a judgment of some sort has gone applies for a new trial, he takes the risk that when the new trial is granted, the result upon retrial might be less favorable than the result of the original trial. Similarly, when a plaintiff who has gotten a judgment for less than he has demanded takes an appeal, he also takes the risk that upon a reversal and a new trial, he may fare less well than he did originally. When the new bank took its appeal in this case and asked for a general reversal, it took the same sort of risk.

There is no force in the contention that the petitioner had no opportunity to be heard upon the issues dealt with in the opinion of the Court of Appeals. After the original opinion was handed down by the Court of Appeals, the petitioner filed a vigorous brief asserting all of its objections to the findings of the Court of Appeals. That this brief received the careful and detailed attention of the Court of Appeals will appear from the most casual reading of the opinion written by the Court of Appeals upon the application for a rehearing. (R. 822-831).

3. A Court May, and Indeed Should, Disregard Admissions of Counsel on Questions of Law Where Such Admissions Are Deemed Erroneous.

Petitioner assigns as a ground for the granting of *certiorari* that the opinion of the Court of Appeals gives the old bank relief beyond that for which the Receiver's counsel had argued in the lower courts, although not beyond the issues made by the pleadings.

It is true that when the case was called for argument in the lower court, counsel for the Receiver stated to the court that while of the opinion that the charges made by the new bank were grossly excessive, they could find no adequate legal basis for relief from the express provisions of the contract with respect thereto. This statement (which does not appear in the record, having been made informally and *arguendo*),¹² was repeated in the appellee's brief in the Circuit Court of Appeals.

It now appears that counsel for the Receiver underrated the power of a court of equity to give the old bank relief against the excessive and unjust claims of the new bank, which stood in a trust relation.¹³ Is this circumstance any reason for denying to the Receiver the relief to which he would otherwise be entitled? Counsel have cited no authority in support of their contention to that effect, and we do not believe that any such authority can be found. It has been repeatedly held that courts are not bound by stipulations of counsel upon questions of law.

¹²The District Judge in his opinion did not discuss the plea of usury, but he referred to the "harsh nature" of the contract and to the fact that the plaintiff had sought "the application of such equitable considerations as the circumstances demand." (R. 694.)

¹³This would not be the first time that the authors of this brief have been wrong in forming an opinion on a question of law. Perhaps this observation may be true also of other counsel and even of courts. Our paramount concern is, of course, to discharge fully and properly our professional obligation to the Court and to our client.

See *Swift & Co. v. Hocking Valley R. R. Co.*, 243 U. S. 281, 287 (1917) :

"If the stipulation is to be treated as an agreement concerning the legal effect of admitted facts, it is obviously inoperative; since the court cannot be controlled by agreement of counsel on a subsidiary question of law.

* * * * *

"The duty of this court, as of every judicial tribunal, is limited to determining rights of persons or of property, which are actually controverted in the particular case before it. . . . No stipulation of parties or counsel, whether in the case before the court or in any other case, can enlarge the power or affect the duty, of the court in this regard.' *California v. San Pablo & Tulare R. R. Co.* 149 U. S. 308, 314. See *Mills v. Green*, 159 U. S. 651, 654. The fact that effect was given to the stipulation by the appellate courts of Ohio does not conclude this court. See *Tyler v. Judges of Court of Registration*, 179 U. S. 405, 410. We treat the stipulation, therefore, as a nullity."

The same rule was applied in *Estate of Sanford v. Commissioner*, 308 U. S. 39 (1939). Numerous decisions of the lower federal courts are to the same effect.

As Judge Holmes remarked in his opinion for the Court of Appeals: "Court sit to do justice between the parties, not merely to decide points in a tilt between lawyers."¹⁴

¹⁴This language may be compared with the following language of the Court of Appeals for the Second Circuit in *In Re Barnett*, 124 F. (2d) 1005, 1010:

"But while a court must often rely chiefly on the arguments of opposing counsel, and while, as a consequence, inadequate arguments may sometimes lead courts to overlook points which counsel have not pressed (so that, indeed the decision may have little value as a precedent), the occasional resulting incompleteness or errors in a decision should not be cherished as a virtue. A court striving to do justice between the parties, should not put on blinders and ignore matters which counsel overlook. We do not, however, mean to suggest that there are no limits to the extent to which a court may relieve a party from the procedural mistakes of his lawyer; thus, for instance, we would be powerless here if no party had appealed." (P. 1011.)

Even if the Receiver could be bound on a question of law by the erroneous admissions of counsel, the stockholders of the old bank, who intervened in this case, could not be. Certain stockholders of the old bank filed a petition of intervention in the case and joined in the demand for an accounting and in the complaint made by the Receiver against the excessive charges of the new bank (R. 42). The new bank moved to strike this intervention (R. 48), but the motion was overruled by the District Judge (R. 76) and a petition for mandamus was denied by the Court of Appeals. The intervenors remain in the case. They could not in any event be bound by an admission made by counsel for the Receiver.

4. *The Opinion of the Court of Appeals is Not, on The Special Facts of This Case, Contrary to Any Local Law, Statute or Decision.*

Petitioner contends that the opinion of the Court of Appeals rested solely upon the conclusion that the charges made by the new bank were void for usury, and that such a conclusion is contrary to applicable local law.¹⁵

No Louisiana case has been cited with facts even remotely resembling the facts of the present case. Petitioner's brief (pages 21, 22) relies solely upon two Louisiana cases in which it was held that it was not usurious to purchase or acquire promissory notes at a discount in view of the provisions of Article 2924 of the Civil Code of Louisiana. On their facts these cases are obviously different from the present case, and they afford no support for the contention that the opinion of the Court of Appeals is inconsistent with decisions of the State courts.

The Court of Appeals put its conclusion upon broad equitable grounds, saying (R. 826) :

¹⁵Usury was specially made an issue in the case by the allegations of the Receiver's supplemental and amended petition (R. 45-47).

"The modern meaning of the word usury implies that some interest was due for the use of money and that an excessive amount was charged or collected. If interest was charged by appellant for the use of money when no money was advanced or owing, then there was a total failure of consideration and such amount should be disallowed. No interest can accrue if no principal is owing. Therefore, we would not say that the interest charged on the million-dollar note was usurious, because that would imply that some interest was due, when the fact is that there was only a potential liability on this note and not one cent of principal or interest was ever actually due or owing thereon."

Article 21 of the Civil Code of Louisiana contains a broad declaration of the applicability of principles of equity:

"In all civil matters, where there is no express law, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason, or received usages, where positive law is silent."

Compare *Jackson v. Ludeling*, 21 Wall. 616 (1874); *Michoud v. Girod*, 4 How. 503 (1845).

That the opinion of the Court of Appeals was not rested solely upon the ground of usury, is apparent from the following language used by the Court in its original opinion (R. 791, 792):

"If the provision were not usurious in attempting to authorize the exaction of interest on assets, it should not be enforced in a court of equity for the following reasons:

"Where the directors of a failing bank form a new bank and in effect pledge to themselves every asset of the old bank, a court of equity should scrutinize the contract with great care and strike down every oppressive and overreaching provision.

This is true even though the stockholders ratified the contract because the parties were not on an equal footing and the directors occupied a position of trust and confidence. The old shareholders were given the option to take stock in the new bank; but for many of them doubtless this was impossible, as very few availed themselves of the option. The contract should have been drawn so as to treat both groups fairly. The directors had the advantage of an intimate knowledge of the old bank's condition, which the ordinary stockholders did not have. A hard bargain driven by fiduciaries in such circumstances is presumed to be fraudulent and void. 25 C. J. 1118, 1119, 1120. The law of fiduciaries would be futile if it lacked the capacity to correct abuses arising out of the relation of trust and confidence existing between the directors of a corporation and its stockholders."

In using this language the Court of Appeals had in mind the proven facts: that the contract between the old bank and the new bank was drawn by an individual who had been vice-president of the old bank and became executive vice-president of the new bank; that the new bank was organized by a group of individuals comprising chiefly the larger stockholders and officers of the old bank; and that most of the capital of the new bank was obtained by a loan from the old bank on the last day that bank was open so little that new cash was provided.¹⁰

The Court of Appeals also referred to the evidence in the record tending to support an inference that the new bank was not entitled to compensation because of its exorbitant charges, its management of the assets so as to bring about the appointment of a receiver and its effort to buy the trust estate at a price that would cause great loss to the stockholders of the old bank (R. 824, referring to the letter to the Comptroller at R. 470). Under the

¹⁰See the findings of fact in the opinion of the District Court, R 689-694.

mandate of the Court of Appeals, these matters are left open for further inquiry upon a new trial in the court below.

That the opinion of the Court of Appeals was based upon the inferences which it drew from the record as to the inequity of the claims of the old bank is further shown by its citation of the recent decisions of this Court denying compensation to receivers and others occupying positions of trust whose conduct was found inconsistent with the high standards demanded of fiduciaries. See *Crites, Inc., v. Prudential Inc. Co.*, 322 U. S. 408 (1944); *Woods v. City Bank Co.*, 312 U. S. 262, 268 (1941); *Weil v. Neary*, 278 U. S. 160, 173 (1928), all cited at R. 830, 831. By its citation of these cases, the Court of Appeals further indicated that this case turned upon its special facts and upon fundamental principles of equity and fair dealing.

5. *There Is No Conflict Between the Decision in This Case and the Decisions in Other Circuit Courts of Appeals.*

Petitioner claims that the decision below is in conflict with the decisions of the First Circuit in *Trustees of Somerset Academy v. Picher*, 90 F. (2d) 741 (1937), and of the Fourth Circuit in *Aberly v. Craven County*, 70 F. (2d) 52 (1934). Even a casual reading of the cited cases will show the dissimilarity between their facts and the facts of the present case, and the entire absence from them of the special circumstances which led to the decision of the Court of Appeals in the instant case.

It is true that in both of the cited cases a note was given by an old bank to a new bank to represent the deficiency between the assets of the old bank and its liabilities, which were assumed by the new bank. **But in both of these cases there was a real and actual de-**

iciency. In the present case there was no deficiency.¹⁷ Even after making charges against the old bank aggregating \$1,311,346.64, the new bank had in its hands, at the time of the rendition of the decree in the District Court, assets of the old bank in excess of all liabilities and claims amounting to \$274,707.83 (R. 759).¹⁸

Moreover, in the cited cases, there was no provision that the new bank should be entitled to charge interest at the rate of 6% per annum upon the assets of the old bank. It is against this charge particularly that the Court of Appeal held the old bank entitled to be protected. No such charge was even attempted by the new bank in either of the cited cases, and there is nothing in the opinion in either of them which is in any way opposed to the opinion of the Court of Appeals in this case, or which is even relevant to any of the issues upon which that opinion was based.¹⁹

¹⁷In the footnote at page 25 of its brief, the petitioner claims that the Comptroller of the Currency recognized that the \$1,000,000 note in this case represented a real obligation, referring to the Comptroller's letter of instruction to the Receiver. (R. 531.) That letter was written on January 23, 1941, almost two years after the filing of the present suit and at a time when all the circumstances of the dealings between the parties were about to be brought before the court. Obviously, the Comptroller did not undertake to say that the note represented any actual deficiency because it is necessarily admitted, even by the new bank, that there was no such deficiency. At the time the letter was written, the note had been placed in Class A assets, which merely had the effect of reducing the amount of assets in Class B (since the aggregate of Class A and Class B assets was to represent liabilities of the old bank). The Comptroller's letter was intended solely to require proper security for the admitted surplus in the liquidation account.

¹⁸In addition to the amount on hand in cash, there was also on hand at the time of the final decree some assets of the old bank which had not yet been realized upon and the proceeds of which will add to the surplus of the old bank's assets over its liabilities.

¹⁹In its brief in the Court of Appeals, the petitioner claimed that the decision in this case was opposed to the decision in *Hightower v. American National Bank*, 254 Fed. 249, 276 Fed. 371, 263 U. S. 351. This contention now appears to be abandoned. Reference to the opinion in the *Hightower* case will show that in that case the new bank made no attempt to make such a charge as is sought to be made in this case. In the *Hightower* case there was an actual deficiency and the new bank actually paid out its own funds to meet such deficiency, seeking only reimbursement for amounts so paid out with interest thereon. See the discussion of the *Hightower* case and of *Richter v. Laredo National Bank*, 62 F. (2d) 289 (C.C.A. 5) in the opinion of the Court of Appeals in this case (R. 827, 829, 830).

6. *There Was No Error in the Decision Upon the Tax Point; the Old Bank Was Clearly Entitled to the Benefit of the Tax Saving Made Through the Use of Its Property.*

The new bank claimed the right to make a profit of \$191,778.55 through its administration of the affairs of the old bank by effecting a saving of that amount in taxes upon its shares of stock through the use of the old bank's real estate. This saving resulted from the fact that under the Louisiana taxing system (which is similar to that of other States) in the taxation of shares of stock in a bank, a deduction may be taken in the valuation for assessment purposes for the value of real estate owned by the bank. The new bank used the old bank's real estate to obtain a credit on the taxes against its shares of stock.²⁰

There can be no argument that the new bank stood in the position of a pledgee. Arts. 3168 and 3176 of the Louisiana Civil Code contain a statutory recognition of the rule that the pledgee must account to the pledgor for the fruits of the pledge. In its brief in this court petitioner argues that the word "fruits" is not broad enough to cover the present situation. The lack of basis for this contention is shown by the comment of an authoritative writer on the Louisiana civil law of Pledge. See Denis on Contracts of Pledge, Sections 205, 206, where the author states that the pledgee

"has no right to use the article pledged for his own pleasure or benefit without the consent of the pledgor",

²⁰The new bank actually charged the old bank the taxes paid on the real estate in an aggregate of \$161,642.78 (R. 354). This charge stands on the final accounting but is offset and extinguished by the credit which the lower courts decreed the old bank must receive for the new bank's saving of \$191,778.55.

and cites also with approval the language of a French commentator to the effect that:

"the pledgee can neither make use of the thing pledged nor have the enjoyment of it nor receive any profit from it without the consent, express or tacit, of the pledgor."

The principles stated are of general application under every system of law. See Restatement of the Law of Security, comment to Section 22; Restatement of Restitution, Article 1, page 12.

A pledgee stands in the position of a trustee as to the use of the pledged property. It is settled in the law of trusts that:

"the trustee is accountable for any profit made by him through or arising out of the administration of the trust although the profit does not result from a breach of trust."

See Restatement of Trusts, Section 203. Comment b on this Section contains the following illustration:

"Thus if the trustee receives payment for the use of the trust property, he is accountable for the money received. * * *"

The new bank's attempt to enrich itself by the tax saving is particularly reprehensible in view of the repeated statements of officers of the new bank in letters to the Comptroller of the Currency that:

"It is not now and has never been our purpose to make a profit on the transaction; in fact, as between a profit and a nominal loss we would prefer the latter." (R. 472, 108, 469).²¹

²¹These repeated protestations were, of course, only consistent with the express language of the contract which provided that the new bank was to be entitled only to *indemnify* itself for liabilities assumed, actual expenses and a reasonable fee. (R. 19.)

In the lower courts the new bank sought to retain the benefit of the tax saving by contending that the saving benefited its shareholders, not itself.²² This highly technical position properly received no recognition in this case from either of the lower courts. While the taxes are assessed against the bank shares, they are required by law to be paid by the bank itself, and were so paid in this case. The Louisiana taxing statute provides that all taxes assessed against the shares of stock of a bank must be paid by the bank **directly** and the bank "shall be entitled to collect the amount thus paid from the shareholders or their transferees". See Dart's Louisiana General Statutes, Section 685, reprinted in the appendix. In practice, as in the instant case, the result is the same as if the tax were laid directly upon the corporation.

While under the law the bank has the right to claim reimbursement from stockholders, in practice no bank does so, and the new bank in this case did not do so. Obviously, it would be meaningless for a bank to collect sums from its stockholders, as to do so would merely add to its undivided profits, which would then be distributed back to its stockholders as dividends. On its own books, in the ordinary case, a bank will charge all the taxes paid by it as an expense of operation before it calculates its profits for dividends. The stockholders pay the tax ultimately by having their dividends reduced by the amount of taxes so paid just as every stockholder in a substantial sense ultimately bears the burden of a tax assessed against his corporation; but no bank ever actually collects from

²²There were only 15 stockholders in the new bank when it was organized (R. 358, 537.) Three of these owned \$445,000 of its stock, or almost half of its capital.

its stockholders the taxes theoretically laid upon its shares.²³

This Court has recognized that the ultimate incidence of the tax is the same as if it were laid upon the bank; see *Bank of California v. Richardson*, 248 U. S. 476, 485 (1918), where the Court said:

"It is undoubted that the statute from the purely legal point of view, with the object of protecting the federal corporate agencies which it created from state burdens and securing the continued existence of such agencies despite the changing incidents of stock ownership, treated the banking corporations and their stockholders as different. **But it is also undoubted** that the statute for the purpose of preserving the state power of taxation, considering the subject from the point of view of **ultimate beneficial interest**, treated the stock interest, that is, the **stockholders, and the bank as one and subject to one taxation** by the methods which it provided."

See also *Schuylkill Trust Company v. Pennsylvania*, 296 U. S. 113 (1935); s. c., 302 U. S. 506, 514 (1938); compare *Commercial Bank v. Chambers*, 182 U. S. 556 (1901); *New Orleans v. Houston*, 119 U. S. 265 (1886).

The refuge which the new bank seeks to take in the corporate fiction fails also because that fiction will be disregarded wherever necessary to prevent fraud or oppression. See Fletcher's *Cyclopedia of Corporations*, Volume 1, pages 139, 165; 13 *American Jurisprudence*, section 70, page 160; *Anderson v. Abbott*, 321 U. S. 348 (1944); *Pepper v. Litton*, 308 U. S. 295, 311 (1939).

²³That, realistically, the taxes are paid by the bank itself, and not by its shareholders, is illustrated by the provisions of Internal Revenue Code, Section 23 (d), by virtue of which a bank is entitled to take a deduction in its income tax return for taxes paid upon its shares of stock.

But even if the new bank's stockholders could be considered third persons, the new bank as trustee could not use the trust property for their advantage. See Restatement of Agency, Section 404; Restatement of Trusts, Sections 203, 206 (j).

In the Restatement of Agency, Section 404, it is said:

"An agent, who in violation of duty to his principal, uses for his own purposes or those of a **third person** assets of the principal's business is subject to liability to the principal for the value of the use."

If the agent diverts the property of his principal to the benefit of a third person, the agent is responsible to his principal, just as much as if he diverted it to his own benefit. On the defendant's own argument, the property of the old bank has been used by the new bank (which was a fiduciary for the old bank) to save taxes for the new bank's stockholders. For such use the new bank is liable to the old bank.

Finally, if there were any substance in the argument that the new bank's stockholders were different from the bank itself the new bank might have recovered from its stockholders in this very suit the \$191,778.55 of taxes which those stockholders would have had to pay if the plaintiff's assets had not been used to relieve them of the payment. See FRCP Rule 14 (a). The defendant, if it had wished to do so, might have asked the Court to implead its stockholders in this case in order that it might have judgment against them for the amount of the taxes which they should have paid. Surely, the new bank cannot be permitted itself to elect whether it will recoup itself from its stockholders or not. Surely, the new bank, occupying the position of a trustee, cannot be permitted by its own election to deprive its beneficiary of the benefit of a tax

saving through the use of the beneficiary's property, and give that benefit to its stockholders. Surely, the defendant under these circumstances can no more claim the benefit of the tax saving for its stockholders than it can for itself.

For all of the foregoing reasons, we submit that the application for *certiorari* should be denied.

Respectfully submitted,

PIKE HALL,
MONTE M. LEMANN,
Attorneys for Plaintiff, Appellee.

FOSTER, HALL & SMITH,
MONROE & LEMANN,
Of Counsel.





APPENDIX

Louisiana Revised Civil Code:

Article 3168—"The fruits of the pledge are deemed to make a part of it, and therefore they remain, like the pledge, in the hands of the creditor; **but he can not appropriate them to his own use; he is bound, on the contrary, to give an account of them** to the debtor, or to deduct them from what may be due to him."

Article 3176—"The antichresis shall be reduced to writing.

"The creditor acquires by this contract the right of reaping the fruits or other revenues of the immovables to him given in pledge, on condition of **deducting annually their proceeds** from the interest, if any be due him, and afterwards from the principal of his debt."

Dart's Louisiana General Statutes:

Section 685. **Assessment of shares—Duty of bank officers.**—No assessment shall hereafter be made against the capital stock, surplus, or undivided profits of any bank, banking company, firm or association, or corporation engaged in the banking business, chartered under the laws of this state, or the United States, doing business in this state, whose capital stock is represented by shares, but the shares shall be assessed at actual value or the same percentage of actual value as that fixed on other property for state and local assessment purposes, to the shareholders at the domicile or location of the bank, banking company, firm, association, or corporation, who appear as such upon the books, regardless of the domicile of the shareholders and regardless of any transfer not registered or entered upon its books. It shall be the duty of the president, vice-president, cashier, or assistant cashier of any such bank, banking company, firm, association, or corporation engaged in the banking business to furnish to the assessor, on or before September 1, 1917, and

on or before the 20th day of January of each and every year thereafter a complete list sworn to of those who are carried on its books as shareholders. **All taxes so assessed against the shares of stock shall be paid by the bank, banking company, firm, association, or corporation engaged in the banking business direct, and it shall be entitled to collect the amount thus paid from the shareholders or their transferees.** (Act 1917 (E. S.), No. 14, § 2)."





(11)

DEC 21 1944

CHARLES E. GORDON
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 718

COMMERCIAL NATIONAL BANK IN SHREVEPORT,
Petitioner,

versus

R. C. PARSONS, RECEIVER OF COMMERCIAL
NATIONAL BANK OF SHREVEPORT,

and

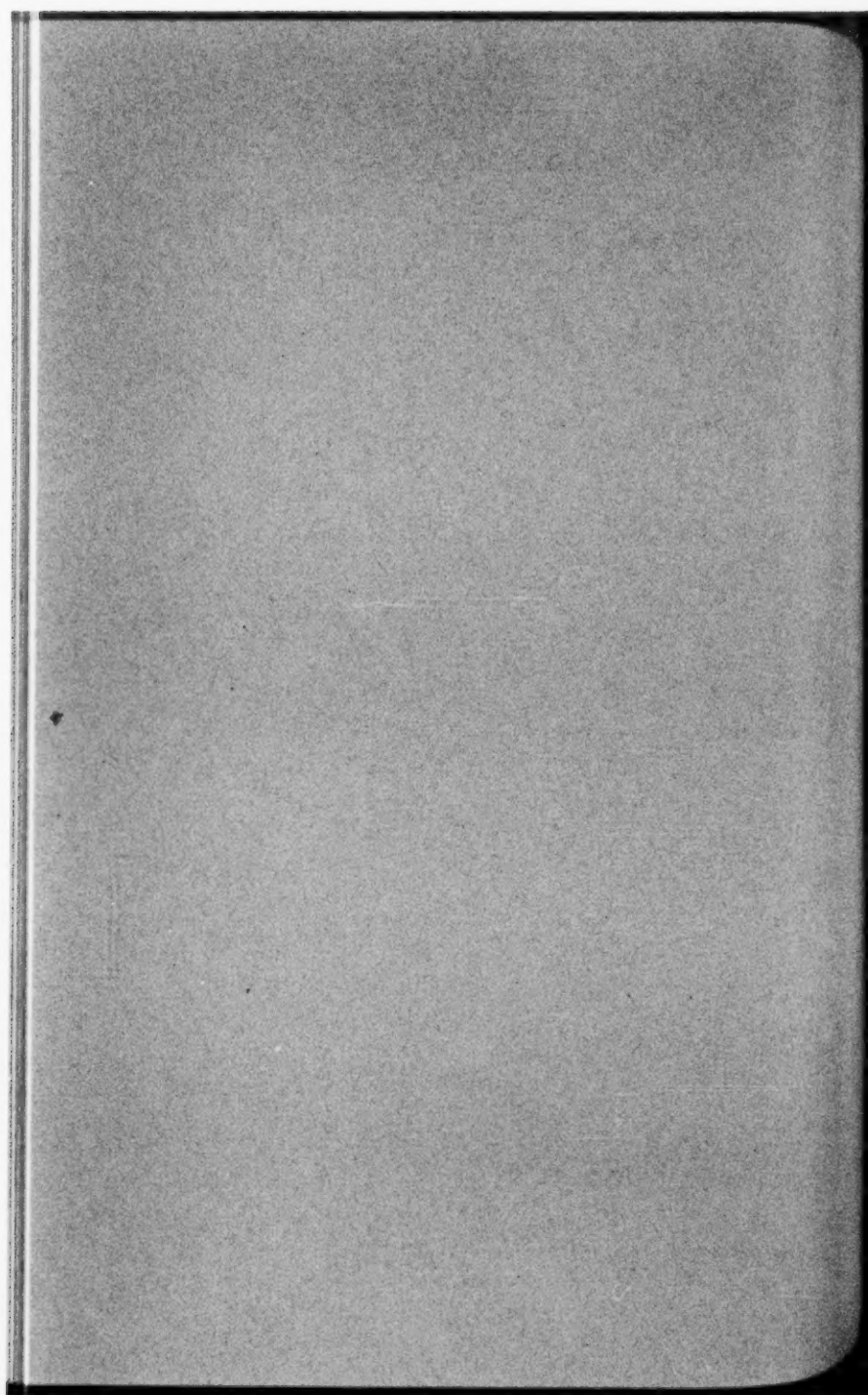
RANDLE T. MOORE ET AL., AS STOCKHOLDERS'
COMMITTEE OF COMMERCIAL NATIONAL
BANK OF SHREVEPORT,

Respondents.

BRIEF OF STOCKHOLDERS' COMMITTEE ON OPPOSITION TO
PETITION FOR CERTIORARI TO UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT.

OTIS W. BULLOCK,
Attorney for Stockholders' Committee.

O. W. & B. D. BULLOCK,
Of Counsel.



SUBJECT INDEX

	Page
I SUITS IN EQUITY ARE TRIED DE NOVO ON APPEAL UPON THE ENTIRE RECORD AND EVIDENCE, REGARDLESS OF THE ABSENCE OF CROSS-APPEAL OR ASSIGN- MENT OF ERRORS	2
II DECISION OF CIRCUIT COURT OF AP- PEALS ON TAX MATTER NOT IN CON- FLICT WITH APPLICABLE LOCAL DE- CISIONS.....	6
III UPON REVERSING DECREE OF DISTRICT COURT CIRCUIT COURT OF APPEALS HAS POWER AND RIGHT AND IT IS ITS DUTY TO REMAND THE CASE TO THE LOWER COURT WITH INSTRUCTIONS FOR FURTHER PROCEEDINGS.....	10
IV DECISION OF CIRCUIT COURT OF AP- PEALS WITH RESPECT TO ONE MILLION DOLLAR NOTE IS NOT INCONSISTENT WITH DECISIONS OF OTHER CIRCUIT COURTS OF APPEALS	11

AUTHORITIES CITED IN BRIEF

FEDERAL DECISIONS

Aberly v. Craven County, 70 F. (2d) 52.....	11
Boynton v. Moffat Tunnel Improvement District, 57 F. (2d) 772; 287 U. S. 620; 77 L. Ed. 538.....	4-5
Edwards v. Lain, 112 F. (2d) 343.....	4
Ferguson v. Omaha & S. W. R. Co., 227 Fed. 513.	4
Hopkins v. Texas Company, 62 F. (2d) 691; 290 U. S. 629; 78 L. Ed. 547.....	3
Irvine v. The Hesper, 122 U. S. 256; 30 L. Ed. 1175..	5
Langnes v. Green, 282 U. S. 531; 75 L. Ed. 520	5-6

Mills Novelty Company v. Monarch Tool & Mfg. Co., 49 F. (2d) 28; 284 U. S. 662; 76 L. Ed. 561.....	3-4
Reid v. Fargo, 241 U. S. 544; 60 L. Ed. 1156.....	6
Ruhlin v. New York Life Insurance Company, 304 U. S. 202; 82 L. Ed. 1290.....	12-13
Somerset Academy v. Pieher, 90 F. (2d) 741.....	11
Standard Oil Company v. Southern Pacific Com- pany, 268 U. S. 146; 69 L. Ed. 890.....	6

FEDERAL STATUTES

28 U. S. C. A. § 877	10
----------------------------	----

LOUISIANA DECISIONS

Calderwood v. Calderwood, 23 La. Ann. 658.....	7-8
Conklin v. Caffall, 179 So. 434.....	8
Gautreaux v. Harang, 183 So. 349.....	8
Ware & Son v. Morris, 23 La. Ann. 665.....	8

LOUISIANA STATUTES

Revised Civil Code, Article 3176.....	6-7
---------------------------------------	-----

MISCELLANEOUS

5 C. J. S., § 1526 (a).....	3
49 C. J. 920-944.....	7
25 C. J. 1120.....	8-9
41 Am. Jur., Pledge and Collateral Security, § 33	7

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944.

No. 718

COMMERCIAL NATIONAL BANK IN SHREVEPORT,
Petitioner,

versus

R. C. PARSONS, RECEIVER OF COMMERCIAL
NATIONAL BANK OF SHREVEPORT,

and

RANDLE T. MOORE ET AL., AS STOCKHOLDERS'
COMMITTEE OF COMMERCIAL NATIONAL
BANK OF SHREVEPORT,

Respondents.

**BRIEF OF STOCKHOLDERS' COMMITTEE ON OPPOSITION TO
PETITION FOR CERTIORARI TO UNITED STATES CIRCUIT
COURT OF APPEALS FOR THE FIFTH CIRCUIT.**

MAY IT PLEASE THE COURT:

Petitioner prays for certiorari to the Fifth Circuit Court of Appeals, alleging that the decision of said court is erroneous in the following respects:

1. Enlarges the rights of appellees in the absence of cross-appeal;
2. Disregards express admissions made in trial court and on appeal by counsel for appellees;
3. Conflicts on important question of local law with applicable local decisions;
4. Conflicts on important question of substantive law with applicable decisions of other Circuit Courts of Appeals;
5. Conflicts on important question arising in administration of affairs of embarrassed national banks with applicable local law.

The petition for certiorari is without merit, because the decision of the Circuit Court of Appeals is fully supported by the record and abundant legal precedents.

I

SUITS IN EQUITY ARE TRIED DE NOVO ON APPEAL UPON THE ENTIRE RECORD AND EVIDENCE, REGARDLESS OF THE ABSENCE OF CROSS-APPEAL OR ASSIGNMENT OF ERRORS.

The suit is one in equity between two national banks, involving the liquidation and settlement by one of the affairs of the other under a contract, and the relief sought is an accounting. The decision of the District Court disposed of several separate and distinct demands, some against and others in favor of the appellant bank, which appealed from the whole judgment and designated the entire record to be included in the transcript of appeal, the designation reading as follows (Tr. 782):

"The Commercial National Bank in Shreveport, the appellant, hereby designates the entire record, proceedings and evidence, in this cause to be contained in the record on appeal."

There was no cross-appeal by appellees.

The law applicable is stated in 5 C. J. S. § 1526(a) in the following language:

"... suits in equity are tried de novo on appeal upon the entire record and evidence. The appellate court itself will sift the whole evidence and determine what the finding of the trial court should have been upon such evidence as was competent and proper. The court below and the appellate court are judges of both law and fact."

In *Hopkins v. Texas Company*, 62 F. (2d) 691, certiorari denied 78 L. Ed. 547; 290 U. S. 629, the Tenth Circuit Court of Appeals said:

"An objection to the consideration of the case on the merits was that the appellant has not assigned sufficient specifications of error; but we think the objection is not well taken. An appeal in an equity suit brings the case up de novo and in order to avoid injustice a plain error, even though not assigned, should be considered. *Central Improvement Co. v. Cambria Steel Co.* (C. C. A.) 201 F. 811; *National Acc. Society v. Spiro* (C. C. A.) 78 F. 774."

In *Mills Novelty Company v. Monarch Tool & Manufacturing Co.*, 49 F. (2d) 28, certiorari denied 284 U. S. 662; 76 L. Ed. 561, the Sixth Circuit Court of Appeals said:

"On the argument here, defendant presents several of the defenses urged below; appellant insists we should consider only the questions which the District

Court decided against it. This is not the rule. Appeals in equity bring up the whole case (with certain inferences in favor of the decree below), and the decree below should be sustained if it was right for any reason. *Linde Co. v. Morse Co.*, (C. C. A. 2) 246 F. 834, 837. It follows that we must consider all those defenses which might be good as against the relief otherwise to be given."

In *Edwards v. Lain*, 112 F. (2d) 343, the Seventh Circuit Court of Appeals said:

"The true rule in this respect is set forth in *Keller v. Potomac Company*, 261 U. S. 428, 43 S. Ct. 445, 449, 67 L. Ed. 731: "****In that procedure (in equity), an appeal brings up the whole record and the appellate court is authorized to review the evidence and make such order or decree as the court of first instance ought to have made, giving proper weight to the findings on disputed issues of fact which should be accorded to a tribunal which heard the witnesses' "".

In *Ferguson v. Omaha & S. W. R. Co.*, 227 Fed. 513, the Eighth Circuit Court of Appeals said:

"The appellants ask, in the event that this court shall sustain the appeal, that it then consider and determine the case upon the merits, though the lower court did not do so. When the entire record of a cause, including all the testimony therein, is before an appellate court upon appeal in equity, such appellate court may consider the case upon the merits, and either enter a final decree, or remand the cause to the lower court, with directions to do so, though the lower court has not considered the merits."

In *Boynton v. Moffat Tunnel Improvement District*, 57 F. (2d) 772, certiorari denied 287 U. S. 620; 77 L. Ed. 538, the Tenth Circuit Court of Appeals said:

"... and since appeals in equity are trials de novo, and since equity speaks as of the present (*Richardson v. Green*, C. C. A. 9, 61 F. 423; *City of Denver v. Mercantile Trust Co.*, C. C. A. 8, 201 F. 790; 21 C. J. 663), we need not explore the effect of that order. Our task is to determine upon the facts drawn onto the record by stipulation of the parties, whether the cause should stand dismissed, whether it should be reinstated and stayed, or whether the plaintiffs are entitled to a decree at our hands, on the record."

On appeal in admiralty, as in equity, there is a trial de novo upon the entire record and evidence, and the jurisprudence is that a cross-appeal is not required.

In *Irvine v. The Hesper*, 122 U. S. 256; 30 L. Ed. 1175, it was held that an appeal in admiralty from the district court to the circuit court of appeals vacated the decree of the former and opened the case for a trial de novo in the latter court. The Supreme Court said:

"We do not think that the fact that the claimants did not appeal from the decree of the district court alters the rule. When the libellants appealed, they did so in view of the rule, and took the risk of the result of a trial of the case de novo. The whole case was opened by their appeal, as much as it would have been if both parties had appealed, or if the appeal had been taken only by the claimants."

In *Langnes v. Green*, 282 U. S. 531; 75 L. Ed. 520, reviewing the jurisprudence applicable to the petition for certiorari in this case, the Supreme Court said:

"The preliminary objection is urged by petitioner, that since the decision below upon this point was against respondent and he has not applied for certiorari, the point is not open here for consideration; but

the objection is without merit, as a brief review of the decisions of this court will disclose."

In *Standard Oil Company v. Southern Pacific Company*, 268 U. S. 146; 69 L. Ed. 890, the Supreme Court said:

"On appeal in admiralty, there is a trial de novo. The whole case was opened in the circuit court of appeals by the appeal of the Southern Pacific Company as much as it would have been if the Director General had also appealed."

In *Reid v. Fargo*, 241 U. S. 544; 60 L. Ed. 1156, the rule applicable to the petition now before the court is stated in the syllabus, which reads as follows:

"An appeal to a Federal circuit court of appeals from a final decree of a district court in a suit in admiralty brings the case before it for a trial de novo so that the court may review an interlocutory decree therein which was not appealed from, and allow a recovery against a party who was dismissed by that decree, and may review both interlocutory and final decrees so far as essential to grant relief to a party who had not appealed from either decree."

II

DECISION OF CIRCUIT COURT OF APPEALS ON TAX MATTER NOT IN CONFLICT WITH APPLICABLE LOCAL DECISIONS.

The contract of December 3, 1932, is a pledge with power of administration, creating a fiduciary relation between the parties, notwithstanding it was in the form of a completed sale. As to the old bank's real estate, it is a contract of antichresis under Article 3176 of the Revised Civil Code of Louisiana, which is in harmony with the general law of pledges. Said article reads in part as follows:

"The creditor acquires by this contract the right of reaping the fruits or other revenues of the immovables to him given in pledge, on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt."

In 49 C. J. 920, the rule as to the relation created between the parties by a contract of pledge, is stated as follows:

"The duties and relations of a pledgor and pledgee are governed more by the general maxims of equity than by the strict rules of the common law. The very nature of the transaction gives rise to a trust relation between the pledgor and pledgee, with its consequent duties to protect the debt or obligation and the collateral. For the purposes of the pledge, the pledgee holds the pledged property in trust first for himself to the extent of his claim and then for the pledgor."

In 49 C. J. 944, we find the rule governing income, profits and advantages derived by pledgee from property held in pledge to be:

"The pledgee must account to the pledgor for all the income, profits and advantages derived by him from the pledged property."

In 41 Am. Jur., Pledge and Collateral Security, § 33, the law of pledges is thus stated:

"***** If, from the use of the property pledged, profits are derived, the pledgee must, in the absence of a special agreement to the contrary, account therefor to the pledgor, and apply the net proceeds of such use to the extinction of the debt."

In *Calderwood v. Calderwood*, 23 La. Ann. 658, the court held that the sale of an immovable to secure a debt

was a contract of antichresis and governed by Article 3176 of the Civil Code, saying:

"William Calderwood holds the property, which is immovable, by a contract of pledge, disguised, however, under the form of a sale. It is an antichresis by which contract he acquires—'the right of reaping the fruits or other revenues of the immovables to him given in pledge on condition of deducting annually their proceeds from the interest, if any be due him, and afterwards from the principal of his debt.' Revised Civil Code, Article 3176."

In *Ware & Son v. Morris*, 23 La. Ann. 665, the court said:

"No doubt it is lawful to secure a debt under an apparent act of sale, but it is nevertheless a pledge or hypothecary right concealed, however, behind the false appearance of the contract of sale. In such a case the title never passes; the real contract may be a pledge or mortgage—the apparent one a sale."

In *Gautreaux v. Harang*, 183 So. 349, the Supreme Court of Louisiana reviewed the jurisprudence on the law of antichresis, quoting with approval *Calderwood v. Calderwood* and *Ware & Son v. Morris*, cited *supra*.

In *Conklin v. Caffall*, 179 So. 434, the Supreme Court of Louisiana said:

"It is sufficient to say that, as an antichresis is only an ancillary contract, it must have a debt or principal obligation to support it—whether the obligation be a pre-existing one or be incurred in the making of the antichresis."

In 25 C. J. 1120, the law applicable to fiduciaries is stated in the following language:

"It is a well-settled equitable rule that any one acting in a fiduciary relation shall not be permitted to make use of that relation to benefit his own personal interest, except with the full knowledge and consent of the other person, and such other person must be in possession of all his powers before he can be bound by that knowledge or consent. When a fiduciary relation is established between parties, courts of equity scrutinize very closely any transactions between the parties by which the dominant party secures any profit or advantage at the expense of the person under his influence. All transactions between parties in this relation are presumptively fraudulent and void."

The above quotation is the law applicable to this case, fortified through the centuries, and refortified by the restatements of the law of all fiduciaries and fiduciary relations by the American Law Institute.

The law of fiduciaries is not merely "an accumulation of legal futilities." It is a part of the plain unchallenged law about which Chief Justice Hughes was talking in his last address to the American Law Institute when he said:

"It is the privilege and duty of the judiciary to demonstrate the capacity of Democratic government to have the peoples' laws administered without 'an evil eye and unequal hand'*****The lamps of Justice are dimmed or have wholly gone out in many parts of the earth, but these lights are still shining brightly here. We are engaged in harnessing our national power for the defense of our way of life. But that way is worthwhile only because it is the pathway of the just. It is our high privilege, although our task may seem prosaic, to strengthen the defenses of Democracy by commending to public confidence and esteem the working of the institutions of justice in both state and nation."

III

UPON REVERSING DECREE OF DISTRICT COURT CIRCUIT COURT OF APPEALS HAS POWER AND RIGHT AND IT IS ITS DUTY TO REMAND THE CASE TO THE LOWER COURT WITH INSTRUCTIONS FOR FURTHER PROCEEDINGS.

In 28 U. S. C. A. § 877, it is provided:

“Whenever on appeal or writ of error or otherwise a case coming from a district court shall be reviewed and determined in the circuit court of appeals in a case in which the decision in the circuit court of appeals is final such cause shall be remanded to the said district court for further proceedings to be there taken in pursuance of such determination.”

The appellant bank prayed for and obtained a reversal of the decree of the District Court for two of five errors assigned by it, the Circuit Court of Appeals saying in its original opinion:

“Its third assignment of error relates to the denial of service charges for administering Class C assets. Its fourth deals with its right to reimbursement for a pro rata share of expenses and salaries in administering Class C assets. Appellant is obtaining a reversal of the judgment on assignments three and four. Our power to reverse and remand generally on these two grounds is beyond question. Except as otherwise directed by us, this case will go back to the district court as if the former trial had not taken place.”

The Court further said:

“Having sought reversal of the judgment, appellant cannot complain of the action of the court on errors assigned by it.”

IV

**DECISION OF CIRCUIT COURT OF APPEALS
WITH RESPECT TO ONE MILLION DOLLAR
NOTE IS NOT INCONSISTENT WITH DECIS-
IONS OF OTHER CIRCUIT COURTS OF AP-
PEALS.**

In support of its contention that the ruling of the Circuit Court of Appeals on the note for one million dollars is inconsistent with decisions of other Circuit Courts of Appeals, the appellant bank cites the following authorities:

Aberly v. Craven County, Fourth District, 70 F. (2d) 52;

Somerset Academy v. Picher, First Circuit, 90 F. (2d) 741.

In each of the cases cited, the bank was insolvent and the note involved therein was given as a symbol of the shareholders' liability for the difference between the sound assets of the bank and its liabilities, as the court said in the Picher case, from which we quote:

"Counsel also lays stress on the fact that the note given was in excess of the capital stock of the bank, but the note was not given to create a new debt, but was simply an acknowledgement of a deficiency found to exist between its sound assets and liabilities, with a pledge of certain doubtful assets to secure the payment, the proceeds thereof to be credited on the note. Richter et al. v. Laredo National Bank (C. C. A.) 62 F. (2d) 289."

In the case at bar, the bank was not insolvent when it was closed and placed in liquidation on December 3, 1932, or when the receiver was appointed on February 21, 1936,

or ever at any other time, as shown by its financial statements of December 1, 1932 (Tr. 341), December 2, 1932 (Tr. 343), December 3, 1932 (Tr. 345), and as further shown by the result of the liquidation through the receivership, which produced sufficient cash to discharge all of its liabilities and to pay the appellant bank \$1,314,743.65 (Tr. 682), leaving on hand cash and other assets valued by the court at \$509,114.49. Besides, the cost of the receivership is approximately \$100,000.00, and there were heavy losses sustained by forced liquidation of its real estate.

Alternatively, if the court should hold that the ruling of the Circuit Court of Appeals with respect to said note was inconsistent with the decisions cited by the appellant bank, such inconsistency would be immaterial for the reason that certiorari will not be granted because of conflict among Circuit Courts of Appeals on questions controlled by state law.

In the case at bar, the appellant bank contends, as stated in its brief, page vii, that the law of Louisiana controls all issues presented; and the court so held, its opinion as reported in 144 F. (2d) 231, reading as follows:

“This is an action for an accounting under a contract that was made in Louisiana and was to be performed there. It involves a controversy between two national banks, but its correct decision upon all issues depends upon the law of Louisiana.”

In *Ruhlin v. New York Life Insurance Company*, 304 U. S. 202; 82 L. Ed. 1290, the court said:

“As to questions controlled by state law, however,

conflict among circuits is not of itself a reason for granting a writ of certiorari.”

Wherefore, for all reasons assigned, we urge that the petition for certiorari should be denied.

OTIS W. BULLOCK,
Attorney For Stockholders' Committee.

O. W. & B. D. BULLOCK,
Of Counsel.



12
FILED

JAN 2 1945

CHARLES ELMORE OROPLEY
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 718

COMMERCIAL NATIONAL BANK IN SHREVEPORT,
Petitioner,

versus

R. C. PARSONS, RECEIVER OF COMMERCIAL
NATIONAL BANK OF SHREVEPORT,

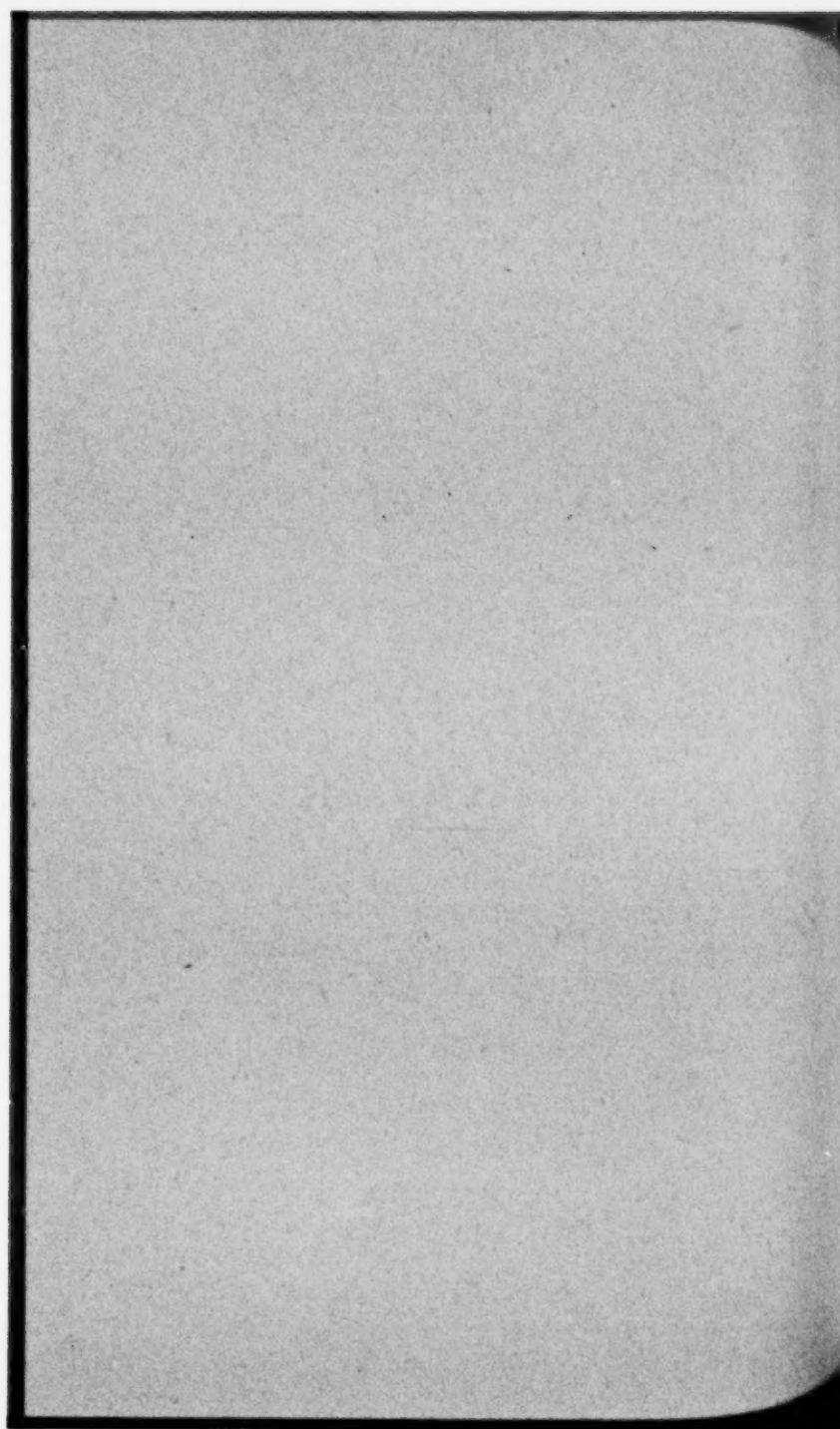
And

RANDLE T. MOORE, ET ALS., AS STOCKHOLDERS
COMMITTEE OF COMMERCIAL NATIONAL
BANK OF SHREVEPORT,

Respondents.

REPLY BRIEF FOR PETITIONER.

SIDNEY L. HEROLD,
SIDNEY M. COOK,
Attorneys for Petitioner.



IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 718

COMMERCIAL NATIONAL BANK IN SHREVEPORT,
Petitioner,

versus

R. C. PARSONS, RECEIVER OF COMMERCIAL
NATIONAL BANK OF SHREVEPORT,

And

RANDLE T. MOORE, ET ALS., AS STOCKHOLDERS
COMMITTEE OF COMMERCIAL NATIONAL
BANK OF SHREVEPORT,

Respondents.

REPLY BRIEF FOR PETITIONER.

The burden of respondents' argument is that the judgment sought to be reviewed is interlocutory. Such fact, however—as the authorities cited in their own brief on pages 8 and 9 demonstrate—has never operated even in the early days of discretionary review, as a barrier to this court's exercise of its power to supervise and review

judgments of Circuit Courts of Appeal; and it would seem that the writ would now the more readily be granted under the recent statutes further broadening the discretionary jurisdiction of this Court. Respondents argue that under the decree of the Circuit Court of Appeals

“the case goes back for an entirely new trial”⁽¹⁾,
(respondents’ brief, page 9),

but that statement does not militate against the argument that what the Circuit Court of Appeals assumed to do proceeded from its departure, not only from orderly rules of judicial procedure, but from its overstepping the jurisdictional limits assigned to an appellate court. The rights of a litigant may be equally violated, and the rules of orderly procedure equally as disregarded by an interlocutory as by a final judgment. May we briefly review the situation under which the case was presented to the Circuit Court of Appeals:

The suit is not one for a general accounting, but upon certain specified causes of action, each of which, so the Receiver alleged, had been the cause of hitherto improper accounting. Upon one of those asserted causes of action (that relating to the so-called “tax savings”, and its subsidiary claim to interest thereon) respondents had judgment in the District Court. Upon another asserted

(1) Whether, by this, counsel mean that the result of the new trial is not compelled by the expressions of the Circuit Court of Appeals, their brief does not make certain; but even so it is felt that petitioner may very properly apprehend a future contention that they were again in error, as they now say they were (their brief, page 18), in respect of the matters conceded by them in the trial court and on appeal.

cause of action, *i. e.*, that based upon the contention that the clause in the contract (R. 18) providing for a charge of 6% per annum interest on Class B assets, was illegal or usurious, the District Court rejected the demands of the plaintiff and intervenor. It did so after the issue had been abandoned by the express declaration of counsel that upon study they had so construed the contract as to convince them that the provision was valid and enforceable.

As to another of these complaints, *i. e.*, that the One Million Dollar note was without consideration, the District Court, upon a like abandonment, based upon counsel's construction of the contract and the surrounding facts, denied relief.

The judgments on these concrete issues in favor of the present petitioner and against the respondents, were never appealed from, and the delay for appeal had long since elapsed when the case was submitted in the Circuit Court of Appeals.

Nevertheless respondents argue (their brief, page 10) that the absence of cross-appeal was no barrier to that which the Circuit Court of Appeals assumed to do. The cases cited sustain no such doctrine. Whatever trial *de novo* may be had is necessarily confined to the limits of the issues raised by appellant. Counsel's misinterpretation of *Langnes v. Green*, 282 U. S. 531, needs no answer, since this Court has expressly disposed of that contention in *United States v. American Express Co.*, 265 U. S. 425, and

in *Helvering v. Pfeiffer*, 302 U. S. 247, 251. The rule is not merely one of procedure—it is one of jurisdiction. And, as this court said in the *Morley Construction Company* case, 300 U. S. 191 (an Equity appeal), it is “inveterate and certain”; and forbids revision of findings, whether of law or of fact, in behalf of an appellee, not cross-appealing, where such revision “carries with it, as an incident, a revision of the judgment”.

Of course, the appellate court had authority to *sustain* the decree below by any reasoning, even though inconsistent with that upon which the trial court’s decision had been based. It possessed no power, however, to enlarge the rights of the appellee, or to lessen the rights of appellant. And manifestly the appellate court possessed no power to decide upon issues abandoned below, and formally declared by appellee to be no longer matters of controversy.

And it is to be borne in mind that what counsel for the respondents did in the lower court proceeded, not from mere expression of abstract law; their conclusions arose from a study of the contract in the light of its applicable surroundings and their admissions were not merely of law, but of conclusions derived from the law and the facts.

Disregarding therefore, the fact that its appellate jurisdiction had never been invoked by respondents, and likewise disregarding the admissions that the matters in question had long since ceased to be issues, the Circuit

Court of Appeals has here assumed *sua sponte* to do what no federal intermediate appellate court has any right to do, consonant with orderly procedure; for which reason it is respectfully submitted that the interposition of this court's supervisory power is here peculiarly required.

Respectfully submitted,

SIDNEY L. HEROLD,
SIDNEY M. COOK,
Attorneys for Petitioner.